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# **OUTLINES OF ROMAN LAW**



# OUTLINES OF ROMAN LAW

BY  
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Second Edition  
(Revised and Enlarged)

"Such is the position of affairs at the present time. The *Corpus Juris Civilis* has now ceased to have any force as an actual code of law, but it will continue to hold its own as a subject of scientific study. As a piece of legislation the system of Roman Private Law was destined to pass away ; as a work of art it will endure for all time."—Sohm ; (*Institutes of Roman Law*).

PUBLISHED BY THE AUTHOR

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## PREFACE TO THE FIRST EDITION

THIS book is intended mainly for Indian students taking up the study of Roman Law for the first time. The books usually prescribed by the Universities are by eminent scholars like Dr. Moyle, Dr. Buckland, and some others. These others, however, could not have contemplated and realised some of the difficulties of India students, ignorant of the Latin language and in some cases not even acquainted with the outlines of Roman history. In writing this book, I have kept these difficulties in view. I have, wherever possible, rendered Latin expressions into English, and have also included a brief account of the history of Rome. I have tried to compare the principles of Roman Law with those of the Indian and the English Law.

The plan of the book is somewhat different from that of other text books. I have attempted to make the student appreciate the development of Roman Law through its different phases. But I am conscious that some scholars may, in several cases, criticise the correctness of the development of Law as traced by me. In tracing the development of any branch, chronologically, it has not been always possible for me to determine with accuracy when a change had taken place.

I may here mention that I have, among others, made a free use of the following books:

1. Dr. Hunter's Roman Law.
2. Dr. Moyle's Roman Law.
3. Dr. Sherman's Roman Law in the Modern World.
4. Dr. Buckland's Roman Private Law.
5. Prof. Jolowicz's Historical Introduction to the study of Roman Law.
6. Lord Mackenzie's Roman Private Law.
7. Sohm's Institutes of Roman Law.
8. Nasmith's Roman History.
9. Leage's Roman Law.
10. Willis and Oliver's Roman Law.

My thanks are due to Mr. S. Govindarajulu, B.A., B.L., LL.B., (Cantab.), Barrister-at-Law, Vice-Principal, Law College, Madras, for the invaluable help he gave me in the preparation of this work, and to Mr. V. Narayanaswamy, M.A., of the Muhammadan College, Madras, for his learned essay on Roman History. Above all, I am indebted to Mr. K. Krishna Menon, M.A., B.C.L., (Oxon), LL.B., (London, Hons.), Barrister-at-Law, Principal, Law College, Madras, for making me take interest in the study of Roman Law. But for him this book might not have seen the light of day.

HAMID ALI

Government Law College,

MADRAS

January, 1935.

## • PREFACE TO THE SECOND EDITION

IN bringing out this book, I have revised it, carefully scrutinised every chapter, re-written some of them and added new ones. Further I have written separate sections stating, wherever possible, the rules of Hindu Law, Muslim Law and English Law so valuable to a student of comparative Jurisprudence.

I have added in the Appendix a brief Analysis of Roman Law which is a reprint of a little book, prepared for his students by the Lecturer in Roman Law at the University of Cambridge (1898), and lent to me by Mr. C. Jinarajadasa, President of the Theosophical Society, who has "crowned his many kindnesses" by allowing me to have my book printed at the Vasanta Press, one of the most excellent institutions of its kind.

I hope that this work, which is the result of twenty-one years of teaching experience, will meet the requirements of all who need an elementary book on Roman Law whether for cultural or professional reasons.

Thanks are due to Mr. L. R. Sivasubramanian, Dean of the Faculty of Law, Delhi University, for many kindnesses ; to Miss E. M. Amery who has read

the manuscript and given me many most valuable suggestions and has taken on herself the burden of reading the proofs and preparing the index in a spirit of service and devotion to duty.

HAMID ALI

*Post script.—*

I have to record the death of Sir Maurice Gwyer, while this book was passing through the press. He was First Chief Justice of the Federal Court of India and Vice-Chancellor of the University of Delhi (1938-1950) in October 1952. I have no words to express my gratitude to him for the keen interest he took in me and my work and for giving me the benefit of his excellent critical judgment. No one who has ever come in close contact with him could forget his brilliant intellect and encyclopaedic knowledge, his courtesy and good humour, his large-heartedness and geniality, his noble dignity and grand personality.

HAMID ALI

Reader-in-Law,  
University of Delhi,  
Delhi.  
*November, 1952.*

TO MY PARENTS



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## INTRODUCTION

### ADVANTAGES OBTAINABLE FROM THE STUDY OF ROMAN LAW

ROMAN Law now forms part of the legal education of most of the Universities in England and India. But, in Sherman's words, "there still lingers in some places that now time-worn belief that a knowledge of Roman Law is of no use at all in the legal profession ". This view is untenable.

" It is based on the assumption that, because the Roman State and tribunals perished centuries ago, therefore Roman Law itself also has long been dead. Now this conception of the fate of Roman Law is historically inaccurate and false. The spirit of Roman Law did not die,—on the contrary it is still very much alive in our midst. Moreover, it was the majestic and beneficent Roman Law which more than any other single element brought civilization back to Europe following the barbaric deluge of the Dark Ages. From Rome we have inherited our conceptions of law, the State, and the family. The high,

firm, secure, legal position of woman in European and American civilization, superior to all other types, is a legacy from the Roman Law. The Civil Law was the first to work out and recognise the equality of woman with man.

The inability of the superficial observer to discern the living Roman Law of to-day is on account of its modern dress: in place of its original Latin garb, Roman Law is now clothed in a twentieth century garment of various patterns such as the Roman-German law, the Roman-French law and the Roman-English law."

The legal phraseology of the Roman jurists is far superior to anything found in Anglo-American law. Law is the main branch of Latin literature. To quote Sir Henry Maine, "it was the only part of their literature in which the Romans themselves took any strong interest; and it is the one part which has profoundly influenced modern thought."

This study is useful for the purpose of comparing Roman law with modern law. It is instructive to compare modern institutions, like marriage and adoption, with the Roman. Moreover, a comparative study of the Roman, the English and the American laws is bound to reveal, "the effect upon each jurisprudence of the different conditions of society under which the Roman and English systems developed. For Roman Law was the product of a highly civilized

people, secured for centuries in the enjoyment of peace within their borders; while the English Common Law is the product of a people emerging from barbaric conditions of society, fond of strife,—it is non philosophical and ethically harsh, the very opposite of Roman law."

Roman Law forms the basis of many modern systems of law on the continent of Europe. The English and American laws also owe a great deal to Roman Law, particularly in the law of contracts, wills, easements and mortgages. We, in India, whose laws are based on English Law, are thus indirectly connected with Roman Law.

In Dr. Lees' words,

"Roman Law is one of the great things which have happened in the world. It is part of a liberal education to know something about it. Roman Law is an introduction to the study of the Science of Law, or, as we call it, Jurisprudence. For many centuries the Science of Law *was* Roman Law. If in modern times it has widened its outlook and improved its methods its debt to Roman Law remains unquestionable."

The ethical value of the study of Roman law is indisputable.

"To conceive of the value of knowledge as based upon its utility for the acquisition of wealth or material success is to completely overlook the chief purpose in all education,—

namely the development of character as well as intellect. . . . The ideal lawyer is not one who has obtained the best legal equipment for the practice of his profession, if that professional training has not developed his character along the lines of what is just and right.

*"What the world needs today is not more law, but more justice.* The great danger to our profession is that its ideals are in peril of being commercialised. In other words, the practice of law is in danger of becoming a mere trade and of losing its professional nobility, thus accurately described by the Roman jurist Ulpian :

'When a man means to give his attention to law he ought first to know whence the term "law" is derived. Now law (*Jus*) is so called from justice. . . .'

"The Roman jurists breathed deeply the pure air of ethics ; they taught the never-to-be-forgotten truth that law and ethics are very closely related. An acquaintance with the loftiest system of jurisprudence the world has ever seen cannot fail to give first of all an enormous uplift to character."

#### I. ROMAN LEGAL HISTORY

To study Roman Law some knowledge of the legal history of Rome is essential. But as no legal

history of a country can be well understood without reference to its political events, it is desirable to begin with the history of Rome.

Roman history may be divided into the following periods :

- |                        |                   |     |
|------------------------|-------------------|-----|
| • 1. The Regal Period  | B.C. 753 —        | 510 |
| 2. The Early Republic  | B.C. 510 —        | 287 |
| 3. The Later Republic  | B.C. 287 —        | 31  |
| 4. The Imperial Period | B.C. 31 —A.D. 565 |     |

#### 1. THE REGAL PERIOD

The Romans, like the Greeks, belong to the Aryan stock. The popular theory is that, centuries before Christ, the Aryans from Central Asia migrated in successive groups southwards and westwards and that the ancestors of the present Hindus, especially the Brahmins, were those immigrants who came to the south. The Aryan branch which emigrated westwards planted a number of colonies on the Mediterranean sea board, in Greece, and in Italy. The Colonies they planted developed into a number of City States about the middle of the 8th Century B.C.

These Greeks and Romans established institutions which resembled considerably those of the Hindus on account of their common origin. Philologists have now established that Sanskrit and Latin both belong to what is called the Indo-Germanic group. But the different laws of these branches are due to historical, geographical, and other local conditions. The Hindus

developed their institutions on their own lines, while those who migrated to Europe developed theirs on parallel though not on similar lines. It will be observed that the conflict of culture is not so very noticeable when one compares Indian institutions with the Roman or Greek. The real contrast is between the Aryan and the Semitic cultures. The home of the Semitic races (*i.e.*, the Egyptians, the Phoenicians, the Hebrews and the Saracens) was somewhere round about Egypt, and the institutions which these developed have not much in common with the Aryan—*e.g.*, Mohammadan Law, a product of Semitic culture, stands in sharp contrast to Hindu Law, a product of Aryan culture.

In B.C. 753, we find Rome just a small dot<sup>1</sup> on the map of Italy on the south bank of the river Tiber, a few miles away from the sea. It consisted of about five square miles, being one among several city-states scattered throughout the length and breadth of Italy.

Rome is said to have been founded in B.C. 753 by Romulus, the first legendary king of Rome, by the fusion of the three tribes, Ramnes, Luceres, and Tities or Quirities. Each tribe was divided into 10 *curiae* and each *curia* into 10 *decuriae*, otherwise known as clans, or *gens*.<sup>2</sup> Again each clan was divided into a number of families. The ties that united a number of

<sup>1</sup> But if we turn to the map of Europe in A.D. 119, we find destiny has made Rome the mistress of the world, extending from the shores of the Atlantic on the one hand to the borders of Persia on the other, and in the north, from the banks of the Danube to the sands of the Sahara in the south.

<sup>2</sup> The word gentleman is derived from *gens*.

families into a clan, a clan into a *curia*, a *curia* into a tribe, depended upon a real or supposed kinship between the various groups as springing from descent from a common ancestor, like the kinship based on *gotra* among the Brahmins.

- A Roman family consisted of a father or the *paterfamilias*, and those subject to his power, *viz.*, his wife, children, and the children of his sons, but not of his daughters. The family also included slaves, and sometimes guests of the family who came temporarily from some neighbouring city to Rome. Besides there was from the earliest times a class of persons who were known as clients. In the words of Dr. Moyle, "From the very first, however, there seems to have been a number of free persons dwelling around the three tribes, and yet not belonging to them; abiding on Roman soil and therefore subject to the dominion of Rome, yet possessed of no civil rights whatever. Some sort of legal status it was deemed requisite to give them, and this was done by placing them in immediate relation to some *paterfamilias*, whereby he became their patron, they his clients."

Above the family was the popular assembly called the *comitia curiata*,<sup>1</sup> which was an assembly of the people comprising all its male members capable of bearing arms. It could be summoned by the King. The voting therein was *curiatim* or by *curias*. When it met, it could only say 'yes' or 'no' to the propositions

<sup>1</sup> *Comitia*, assembly; *Curiata*—from *curia*, a lance; *comitia curiata*—an assembly of able bodied men.

put to it for vote. In other words, it had no power of initiative on any matter connected with the State. The senate nominated the king. The nomination had to be confirmed by this assembly which also conferred the *imperium* (royal authority) on him. Its assent was necessary on questions of war and peace and on the grant of citizenship to aliens. It also gave its assent or disapproval to wills and adoptions made by private citizens, and when it met for this purpose it was called the *comitia calata*. Further, no important change could be effected in the law without its consent.

The third important element in the state was the Senate. It consisted of the chiefs of the different *gens* or clans. Originally, there were 100 members later 200, and at about the end of the Regal Period it consisted of 300 members, probably 100 from each tribe. Its members were chosen by the King. It was an advisory body to the King and it deliberated on matters prior to their introduction before the popular Assembly.

The King (*rex*) presided over the Senate. His Office was not hereditary, he was elected by the *comitia curiata* upon the proposition of a senator. He was the head of the Roman State. He was the commander-in-chief, and the head of the administration of justice. Besides, he was the Chief Priest, *pontifex maximus*.<sup>1</sup> This, in brief, is the nature of the Roman State during the earliest period of its

<sup>1</sup> *Pontifex*—priest; *maximus*—greatest.

history. In all there were seven kings who are reputed to have ruled Rome. We are, however, not concerned with their lives. For, until about B.C. 450 when the XII Tables were codified, the history of Rome is enshrouded in the mists of tradition and legend. Modern historical research under the leadership of Lewis, Lambert, and Pais has done much to discredit what before used to pass as historical fact. Whatever may be said about the accuracy of the political events between B.C. 753 and B.C. 510, there is no doubt as to the three institutions—the monarchy, the senate, and the *comitia curiata*.

Among the kings of Rome, the name of Servius Tullius should be mentioned. He was the sixth of the seven kings who ruled in Rome between B.C. 578—535. He ordered a census to be prepared of the inhabitants of Rome, who were required to give on oath an accurate return of all their possessions and he divided the Roman population into five divisions on the basis of wealth as follows :

Class	Ases
I	1,00,000 and above
II	75,000        "
III	50,000        "
IV	25,000        "
V	12,500        "

The residue consisted of those who were exempted from all taxation by reason of their indigence.

Before proceeding further, a word might be said about a class of people known as the plebs, or

plebeians<sup>1</sup> in the Roman State. About the middle of the sixth century B.C. there were a good number of these people permanently settled in Rome. They were in a large majority while the patricians were in a small minority. In order to trace the history of this community, we must begin again at B.C. 753. Mention has already been made of the constitution of the Roman State and the Roman family, which consisted of the father and his descendants, clients, and slaves. Besides these, there were also the manumitted slaves who continued to be under the patronage of the head of the family to which they originally belonged. In cases where there was no patron, (perhaps owing to the extinction of a particular family), these freedmen, as well as the clients attached to the family, would have no one to look to except the king for patronage. These constituted the beginnings of the plebeian order. When more and more foreign immigrants settled down in Rome, they were also classed among the plebs.<sup>2</sup> Whatever might have been the origin of this body, there was such a considerable number of them without civil rights or duties, in the time of Servius Tullius, that he thought it worth his while to give them some status in the body politic. He required the members of each of the classes detailed above to render fully equipped military service free of cost to

<sup>1</sup> As to the origin of the plebeians there is a diversity of opinion, of which what is given here seems to us to be the best.

<sup>2</sup> From the beginning they had no political rights and they were exempt from taxation and also from military service. Both these burdens hitherto fell entirely on the shoulders of the Roman citizens—the Patricians.

the State, the most costly branches of the service being allotted to Class I and so on. The residue was also liable to military service but at the cost of the State.

Servius Tullius distributed the members of the various classes into centuries for military purposes. This was called the *comitia centuriata*, and it was the assembly of the whole populace in military order. Each century had one vote. The division was as follows :

	Centuries
Cavalry (knights)	18
1st class (Seniors) <sup>1</sup>	40
Juniors <sup>2</sup>	40
2nd Class Seniors	10
Juniors	10
3rd Class Seniors	10
Juniors	10
4th Class Seniors	10
Juniors	10
5th Class Seniors	15
Juniors	15
Residue	4

<sup>1</sup> Seniors were persons above 46 years of age and Juniors between 16 and 46.

<sup>2</sup> The Juniors were forced to serve abroad, while the Seniors did garrison duty. Nasmith says, "Though in all cases as will be seen, the *Seniores* had the same number of votes as the *Juniores* of the same class, yet the century of *Seniores* in each instance was composed of fewer members than the corresponding century of *Juniores*. The intention and effect was to neutralise the undue influence of numbers, to balance numerous youth by less numerous but more experienced age, and the comparative poverty of the many by the wealth of the few."

From this it will be evident that, if the cavalry and members of the first class all voted one way, voting by the rest was useless.

The next important event in this period is the overthrow of the monarchy in B.C. 510, and the establishment of the Republic. It is said that Sexfus Tarquinius, the son of Tarquin the Proud, the king of the Romans, violated the modesty of a Roman matron, Lucretia, which so exasperated the Romans that they drove away their king, and determined never to allow one to rule over them again. It appears even the word monarch was ever afterwards hateful to their ears. Modern writers say that the legend of the rape of Lucretia is only a picturesque way of saying that the kingship was abolished.

## 2. THE EARLY REPUBLIC

The Republic was established in B.C. 510. Instead of one king, nominated for life, there were now two supreme magistrates of co-ordinate authority called consuls, appointed for the term of one year. It is a popular maxim that two kings cannot rule over a kingdom at one time. The Romans seem to have managed this by giving each consul the power of *intercessio* i.e., veto. They were clothed with the *imperium* by the *Comitia Curiata*, as the kings had been in the Regal period. The other elements in the State were the senate, the *comitia curiata*, and the *comitia centuriata*. These institutions continued to

exist just as before. To all outward appearance there was not much change in the constitution. In fact, important changes were noticeable. The Senate gradually grew more and more powerful, for the simple reason that the consuls had to be elected annually from among the senators, and the retiring consuls were required to give an account of their doings to it. In order to protect themselves, the consuls consulted the senate in advance on all important matters. Further, the consuls were from this time no longer the chief priests. Again, the consuls had appointed two officers called *quaestors*, whose function was to administer justice in criminal cases and to supervise the finances of the State. Once these officers were created they became a permanent factor in the State and their appointment minimised the power of the consuls to some extent. Moreover, the right of the *comitia curiata* to hear appeals from any capital sentence passed on any Roman citizen by the kings was extended by a statute which enacted that any citizen condemned to death by a magistrate had the right of appeal to the *comitia centuriata*. In spite of all these limitations, the consuls continued to be the heads of the Roman State, and they were the commanders-in-chief of the Roman Army. The *comitia curiata* receded to the background, and the *comitia centuriata* took its place as a popular assembly. The power of the former gradually dwindled down until at last its chief function was to sanction adoptions and wills made by private individuals.

## THE STRUGGLE BETWEEN THE ORDERS

So long as there was strife at home, Rome continued to be just a little city state, but the enactment of the *Lex Hortensia* in B.C. 287 by which all the laws passed by the plebeians bound the two communities alike, ended the conflict for the time and Rome spread her conquests rapidly, until in two decades she became mistress of the whole of Italy.

Most of the political events now centre round the conflict between the patricians and the plebeians for political power. The struggle between the patricians and the plebeians was the outcome of the many disabilities to which the plebeians were subject. First, their senators were not given the same rights as their patrician colleagues. Second, for a long time they were not selected for any of the magistracies. The patrician magistrates showed class spirit and were despotic in exercising their powers. Third, the patricians reserved large portions of the public lands for themselves. Fourth, "The plebeian yeomen were continually being called to fight. They had to leave their little farms untilled, or let the crops rot on the ground. Most of them were reduced to borrow at high rates from the patrician moneylenders, and under the harsh law of *nexum*<sup>1</sup> found themselves prisoners for debt in the private prisons of their creditors. The

<sup>1</sup> A contract of *nexum* was a transaction of a loan of money formed by *mancipatio*. The debtor was allowed certain days of grace and, if he did not pay before the expiry of the period, the creditor could bodily seize the debtor, make him his slave, sell him across the river Tiber, or, if there were more than one and if they chose they might cut him into pieces and divide the fragments between themselves.

sufferings of these *nexi*,—Roman Citizens who had fought the battles of their country,—inflamed the passions of the *plebs* to fever heat."

So, whenever matters came to a crisis, whenever the plebeians persistently clamoured for a particular reform in the State and found that all their efforts were in vain, they either threatened to leave Rome in a body in order to establish a rival republic, or actually carried out their threat by receding in a body to some place outside Rome. By such threats they were able to wring out concessions from the unwilling patricians. Thus, the office of the tribune was created in B.C. 494. The tribunes were plebeians and they were at first two in number, then five, and ultimately ten. Their chief function was to protect the plebeians from any high-handed act of the Consul or the Senate or the Roman magistrate. Their bodies were made inviolable and they could veto by their *intercessio* any act of any official in the State. They were elected annually, had two plebeian officers called *aediles* to help them and were further empowered to supervise the markets and to keep law and order in the State.

In about B.C. 489 another assembly, the *comitia tributa*<sup>1</sup> came into existence. It was entirely composed of plebeians convoked by the tribes, although in theory it was considered as consisting of the entire population, both patricians and plebeians. Rome was

<sup>1</sup> There is a difference of opinion as to the probable date of its origin. Some say that it was founded by Servius Tullius in the Regal period; others, that it was created approximately sometime between the foundation of the republic and the Twelve Tables (B.C. 753 to B.C. 450).

divided for this purpose into territorial divisions, something like the municipal divisions in a city. Hence this assembly differed substantially from the *comitia centuriata*, the constitution of which was entirely different.

There was also another body, the *concilium plebis*, created about B.C. 449, an unofficial body consisting entirely of plebeians. In this assembly the plebeians met informally and discussed matters which affected them. In Dr. Lee's words, "We get the surprising result that part of the community asserted and secured power to legislate for the whole, and that there were four types of assembly in theory or in fact competent to make laws for the whole people, *viz.*, (1) *comitia curiata*; (2) *comitia centuriata*; (3) *comitia tributa*; (4), *concilium plebis*. But the first, as we have seen, was a legislative body in form only, while the second and the third were the popular assembly variously organised". As to the *comitia tributa* and *concilium plebis*, "these bodies were formally distinct, and continued to be so until they ceased to function in the early days of the empire. The *comitia centuriata* was convoked (usually) by a consul, the *comitia tributa* by a consul or praetor, the *concilium plebis* by a tribune. In the later days of the republic, the *concilium plebis* was the normal vehicle of legislation, and its enactments are termed *leges* (no longer *plebiscita*). The *comitia centuriata* was summoned to vote upon questions of peace or war, or otherwise of constitutional importance."

## THE CODIFICATION OF THE TWELVE TABLES

The next great event that happened was the codification of the law in B.C. 450 called the XII Tables. For this purpose a commission of ten persons called the *Decemvirs* was appointed in B.C. 451 who were put in sole charge of the administration of the Republic, all the other magistracies in the meanwhile being suspended. The result of their labours was the committing to writing of the customary law of the Romans. At first, there were ten tables<sup>1</sup>; two more were added later.

This codification was another great triumph of the plebeians, for, from the first, the patrician *pontiffs* claimed the sole knowledge of law and procedure. Besides, the latter were in charge of the Roman calendar and claimed the prerogative of announcing the auspicious (*fasti*) and inauspicious (*nefasti*) days. The Romans, being a superstitious set of people, did not allow their Courts to function, or their public assemblies to meet on days which were not propitious. Further, even if they met on good days, they might be dispersed by order of their priests, the augurs, when some event, alleged to be inauspicious, occurred. Thus, these priests exerted considerable influence over the affairs of the State. The plebeians found their position quite insecure; and they insisted from the beginning that the laws should be committed to writing so that everyone might know the law of the land.

<sup>1</sup> Table from *tabula*, board, a tablet of wood.

The beginnings of Roman Law may be traced to the XII Tables. They are as important in Roman history as the *Magna Carta* in English history. The contents of the XII Tables, if examined from a modern point of view, are crude and semi-barbarous in their nature, as may be seen from the following:

1. "It is unlawful to burn or bury the dead within the city. . . . The flute-players at a funeral must not exceed ten in number . . . . Women must not tear their hair nor make immoderate wailings . . . . Gold must not be buried with the dead, but if the teeth are fastened with gold that may be either buried or burned. The wood of the funeral pyre must not be smoothed.
2. It is lawful to kill any one committing a robbery by night.
3. Death shall be the penalty:
  - (a) For the acceptance of a bribe by a judge or an arbitrator.
  - (b) For arson of a house or haystack near a house. In this case the death shall be by fire and preceded by scourging.
  - (c) For perjury. The perjured shall be thrown from the Tarpeian rock.
4. A child born more than ten months after the death of its reputed father is illegitimate. Monstrous or deformed offspring are to be at once destroyed.

5. The measure of damages in the case of the fracture of a bone (of a tooth) of a free-man, shall be 300 ases ; in the case of a slave, 150. In the case of the slightest bodily injury, the measure of damage shall be 25 ases."

"The importance of the XII Tables does not lie, however, so much in their contents as in the fact that they opened up new possibilities. Two things were achieved by this publication *viz.*, (1) the law was made public and (2) the law was made applicable equally to all. Once it was published it was freed from the trammels of religion, and the law was set on a secular basis. Progress in legal ideas became possible when law became a matter for public discussion. The publication of the XII Tables then is the first step in the great development of Roman Law in the next thousand years. In Dr. Lee's words,

"This was looked upon by the Romans of later ages as the starting point of their legal history, 'the fountain', Livy calls it, 'of all public and private law'. When Cicero was young, school boys learnt it by heart, and it was commented upon by jurists of the late republic and early empire, including Labeo . . . and Gaius . . . It remained formally in force until superseded by Justinian's legislation, nearly ten centuries later.

The Law of the Twelve Tables is usually spoken of as a code, but it was far from being a codification of the whole law. Perhaps

it dealt with matters of current controversy and left untouched principles which had not been called in question. But as to this we have no certain knowledge, and we cannot say what changes the Tables made in the law.

"It is a picture of a primitive agricultural society, in which government has scarcely emerged from the stage of regulated self-help, in which law has not yet been disentangled from religion, in which the sinister exercise of magic is a thing to be guarded against and visited with religious sanctions."

In the course of less than two centuries after the publication of the XII Tables, the plebeians managed to secure for themselves political, legal, and social equality with the patricians. Five years after the XII Tables were published, the *Lex Canuleia* was passed, in B.C. 445, which enabled the plebeians to intermarry with the patricians. Again, in the matter of political equality, the resolutions of the plebs in the *concilium plebis*, gradually attained binding character by the *leges Valeriae Horatiae*, (B.C. 449) and the *leges plublitia*, B.C. 339, and finally by the *Lex Hortensia*, B.C. 287, which enacted that the statutes should be equally applicable to all Roman Citizens.

By the end of this period, the plebeians had gradually gained an entry into all the important offices of the State. They had never gained the highly coveted office of consul since the establishment of the republic. Whenever they brought pressure to

bear upon the patricians on this score, the latter evaded the issue and created some new office or other and gave it to them, e.g., the office of the tribune. The agitation to have the law written down resulted in the appointment of the *Decemviri* who were dictators superseding the consuls and tribunes, but they were removed as soon as the XII Tables were published. A new set of consuls called military tribunes were appointed, and they were also eligible for consular office, but, in fact, they were excluded from it. In about B.C. 443, the patricians, fearing that the plebeians might lay claim to the consulship, divested the consul of some of his powers and created the office of *Censors*, these were two in number, both of whom were to be patricians. By B.C. 367, the *leges Liciniae* were passed, which abolished the new office of the *military tribunes*, and established that at least one of the consuls must be a plebeian. As soon as this privilege was conceded, another new office was created, that of the *praetor urbanus*, in B.C. 367, in whom the judicial functions of the consul were vested. Though at first this office was maintained exclusively for the patricians, the plebeians ultimately contrived to gain admission to it by B.C. 337.

After this victory the plebeians gradually gained admission to all the other offices, and finally, in B.C. 300 by the *lex Ogulnia* to the College of *Pontiffs*<sup>1</sup>

<sup>1</sup> The college of *pontiffs* consisted of priests who played an important part in the development of Roman Law. In Sohm's words, "At the outset the work of interpreting the law—i.e. of carrying on, in its initial stage, the development of the *jus civile*—was performed by the *pontiffs*. It was

and *Augurs*<sup>1</sup>, and ultimately the equality between the two orders became complete in all matters, and thus ended the struggle which was followed by the expansion of Rome from a City-State into a vast empire.

### 3. ROMAN LAW IN THE LATER REPUBLIC

This subject may be divided as follows:

- (a) The Legislative bodies in the State.
- (b) The edicts of the praetors—*Urbanus* and *Peregrinus*.
- (c) The influence of Greek Philosophy on Roman Law.
- (d) The rise of a class of jurists called the *veteres*.

#### (a) *Legislative Bodies in Rome*

- (i) The *Comitia Curiata*. As a popular legislative assembly, it fell into the background, and the only

regarded as the special professional duty of the pontiffs to preserve the knowledge of the laws of the Kings. In consequence more particularly of the knowledge they thus possessed, and also of their general scientific learning, it became their office to assist with legal advice, not only magistrates in regard to the exercise of the jurisdiction vested in them, but also private parties in regard to the steps to be taken in concluding contracts and carrying on lawsuits. Thus it happened that the business of interpreting the existing law, and thereby developing the civil law, passed under the control of the pontiffs."

<sup>1</sup> An *augur* is defined by Dr. Smith as "a member of a particular college of priests at Rome, who foretold the future by observing the flight or notes of birds, the feeding of the sacred fowls, lightning, certain appearances of quadrupeds, and any unusual occurrences." These offices were regarded as specially valuable by the patricians, because they enabled them to be the custodians of legal procedure.

part which it played now was a formal one. It met as before to sanction acts of adoption or to ratify a will. Gradually it dwindled down until it comprised barely thirty persons called *lictors*.

(ii) and (iii) The *Comitia Centuriata* and the *Comitia Tributa*.<sup>1</sup> They were the chief popular legislative assemblies in this period. In the one, the plebeians had the greatest influence, while in the other, the patricians were supreme. Ultimately the *Comitia Tributa* became more powerful.

(iv) The Senate. It is not easy to define exactly the power of the senate in this period. Its power seems to have varied at different times. Its legislative power originally was confined to ratifying or refusing its consent to the laws enacted by the popular assemblies. During the Republic, first the *Comitia Centuriata*, and later, the *Comitia Tributa*, were supreme in the State, but they rarely enacted laws without the authority of the senate which usually decided the issue in all important matters and later obtained the sanction of either of these bodies as the case might be. It was customary for the senate to determine many things on its own initiative. When the *Comitia Tributa* became supreme, the Tribunes took upon themselves the right of refusing consent to the decrees of the senate and made them ineffective. Again, it often passed enactments without obtaining the consent of

<sup>1</sup> In the Republican period, Rome presents a spectacle of having two equally competent legislative bodies. The wealthy persons in the *Comitia Centuriata*, knowing the power of the *Comitia Tributa* wisely avoided any conflict with it.

the senate. At the end of the Republic and during the early days of the Empire, both these bodies lost their importance, and their place was taken by the senate as a popular assembly. Its decrees in its legislative capacity are known as *Senatus Consulta*. Here, it may be observed, that Roman law owes little to the enactments of legislature and that its development is mainly due to the praetors and the Roman jurists.

(b) *The Edicts of the Praetors—Urbanus<sup>1</sup> and Peregrinus<sup>2</sup>*

The Praetor was the principal judicial officer, and his rank was next to the consul. It was his practice to promulgate an edict or order when he first took charge of his office, and this was in force until he vacated his office at the end of a year. The edicts dealt with the rules by which the praetor intended to be guided in the administration of justice. These were called *Edicta Perpetua*, in contrast with *Edicta Repentina* which were applicable only in a particular case.

Gradually each succeeding praetor began to incorporate into his edicts practically all the rules passed by his predecessor, with such modifications as he might deem necessary to suit the needs of the times. Thus the praetor's edict was both a conservative and a progressive institution. It brought the law up-to-date, without being too revolutionary, for it must be remembered that the Romans were a conservative

<sup>1</sup> and <sup>2</sup> created in B.C. 367 and B.C. 242 respectively.

people, and it took nearly five centuries for Roman law to develop to its full extent. That portion adopted by the new praetor was called the *Edictum Tralaticium* (i.e., the edict handed on), and the part newly added, "*Edictum Novum*" (i.e., the new edict). Thus it is said, "a regular system of judge-made law grew up in the praetorian court which, in addition to the statutory and customary law already in force, became, in point of fact, a most potent factor in the legal system". In Sohm's words,

"As the edict was never valid for more than one year, it was a convenient instrument for giving new principles a trial. If the innovations did not answer, they could be dropped again at once. The praetors in general showed little taste for the sudden adoption of far-reaching general principles. They confined themselves rather, in the first instance, to laying down rules for a perfectly definite case, the conditions of which were clearly apprehended. The next praetor might then add some further clause to the edict of his predecessor, the third might take yet another step in advance, and so on. It was precisely on account of this objection to far-reaching generalisations that they always hesitated to strike out anything that had once found its way into the edict. They preferred the method of adding a second concrete case to the first, a method

which had this further advantage that it secured accuracy of verbal expression—an important consideration, since the praetorian edict, like the statutes, was interpreted according to its letter. Thus there grew up in the edict a kind of code of private law, made up of a number of rules on the granting of actions, *admission* of pleas, and so on, and couched, moreover, in a style which was not exactly Ciceronian, nor even pleasant to read. Nevertheless it was by means of this code, with all its old-fashioned jargon and cumbersome phraseology, that the wisdom, experience, and foresight of bygone ages were handed down from generation to generation. It was a code which combined conservatism with a ready susceptibility of change, thus standing at the same time firmly rooted in the experience of the past and the life and movement of the present."

The *Praetor Urbanus* administered only the *Jus Civile* or the private law peculiar to the Romans, and he adjudicated only when both the parties were Roman citizens or, if non-citizens, they had the *Jus Commercium*, or in case they had some special treaty with Rome.<sup>1</sup> The result was that no foreigner could claim protection of the Roman civil law which was exclusively reserved for the Roman Citizen.

<sup>1</sup> For example, the Carthaginians, who were given special privileges, because Rome had entered into a special treaty with Carthage conferring the *jus commercium* on them.

In practice this is what happened. For instance, in the case of a sale by a Roman citizen of an ox, there had to be a formal ceremony called *mancipatio*,<sup>1</sup> before the purchaser could become the owner. If he happened to be a foreigner who could not, being a non-citizen, take part in the transaction, he would acquire no rights over his purchase under the *jus civile*, and if later the seller claimed the thing, he had no remedy, because being a non-Roman he was outside the pale of Roman Law. The only alternative left to him was not to have any dealings with the Romans, which would be an impractical proposition as Rome was becoming an important commercial centre on the Mediterranean sea-board. Therefore, many of the merchants who flocked to Rome took the risk of carrying on their commercial transactions in spite of the law which was thoroughly adverse to their interests.

This state of affairs could not continue long, and soon after the conquest of Italy, the office of the *Praetor Peregrinus* was created in B.C. 242. This officer also issued edicts at the commencement of his office, but he dealt only with cases where both the parties to the litigation were foreigners or where one was a foreigner and the other a Roman citizen. In issuing his *edictum perpetuum*,

<sup>1</sup> There had to be five witnesses, all Roman citizens, of the age of puberty and a *libripens* or balance holder with a pair of scales to weigh out copper. The *libripens* weighed it out, and the purchaser took possession of the thing sold and only then he became its owner.

he administered a law called the *jus gentium*.<sup>1</sup> In Sohm's words,

"There is a moment in the history of every nation when the claims of a natural sense of justice assert themselves and revolt against the hard and fast austerities of ancient traditional forms. The Romans had now arrived at this stage. The *jus gentium* represented the *jus aequum*, the development of which, in opposition to the *jus strictum* of ancient tradition, proceeded henceforward with ever increasing power. The whole tendency of the history of Roman Law pointed to the suppression of the *jus strictum* by this new equitable law, and to the consequent destruction of the ancient *jus civile* by the *jus gentium*. But it must not be imagined that the development was a very sudden one. Such a course would have been entirely alien to the legal instinct of the Romans. The *jus gentium* did not come down like a hurricane and sweep away the *jus civile*. The slow and gradual elaboration of a system of equity alongside the older and stricter law was rather the work of a patient and uninterrupted development extending over a period of more than five hundred years."

<sup>1</sup> That is to say, the law common to all nations. "It is called the *jus gentium* or the law of peoples, that is, of peoples in general; for *jus gentium* is Latin for the law of the World."

The growth of the *jus gentium* was not without its effect on the Roman civil law administered by the *Praetor Urbanus* who, finding the rules of the *jus gentium* more just and reasonable, began to incorporate them into his edicts. This he did largely by means of the discretionary power vested in him in the matter of civil procedure and also by frequent recourse to legal fictions. In course of time, the edicts of the *Praetor Urbanus* became more and more imbued with the *jus gentium* until it practically displaced the *jus civile*. To quote Dr. Lee,

"The Praetor could not, properly speaking, make law, because he had no legislative authority, but owing to his control of procedure he was able to make fundamental changes in the legal system, as, for instance, in the matter of intestate succession, and the Praetor's edict became the source of a system of equity which existed side by side with the civil law without being absorbed in it, just as the equity of the English Chancellor existed side by side with the common law. It was - due to this influence more than to any other that the law of Rome was transformed from a narrow technical system into a system fit to meet the demands of a growing civilisation and an expanding empire. But the praetor in framing his edict did not exercise an arbitrary discretion. Though, like every educated Roman, he would have some knowledge

of law, he was not necessarily a highly skilled lawyer. He was expected, therefore, to consult his consilium, a body of expert advisers, and he was, of course, controlled by public and professional opinion."

#### JUS HONORARIUM

The *Jus Honorarium* was the name given to the body of law promulgated in the edicts of some of the magistrates in Rome, particularly, the praetor. It was called *jus Honorarium* or the honorary law, because those who bore honours in the State had given it their sanction. It was also called the *jus Praetorium*. It was largely made up of rules derived from the *jus gentium*, but also included rules of the *jus civile*, and so was, in a sense, more extensive than the former. In other words, it was a skilful combination of both.

#### (c) Effect of Greek Philosophy on Roman Law

When the Romans conquered Greece in the middle of the Second Century B.C., Greek culture, philosophy, and art spread in Rome, so that it has been said that it was not Rome that conquered Greece, but Greece that conquered Rome. The effect of Greek Philosophy on Roman law is noticeable particularly in the philosophy of the Stoics. The chief doctrine of the Stoics is "Live according to Nature". What they meant by nature was "the universe of things", and

the Stoics declared that this universe was guided by reason. In Sandar's words,

"By *lex naturae*, therefore, was meant primarily the determining force of the universe, a force inherent in the universe by its constitution (*lex est naturae vis*). But man has reason, and as reason cannot be twofold, the *ratio* of the universe must be the same as the *ratio* of man, and the *lex naturae* will be the law by which the actions of man are to be guided, as well as the law directing the universe. Virtue, or moral excellence, may be described as living in accordance with reason or with the law of the universe. These notions worked themselves into Roman law, and the practical shape they took was that morality, so far as it could come within the scope of judges, was regarded as enjoined by law. The jurists did not draw any sharp line between law and morality. As the *lex naturae* was a *lex*, it must have a place in the law of Rome. The praetor considered himself bound to arrange his decisions so that no strong moral claims should be disregarded. He had to give effect to the *lex naturae*, not only because it was morally right to do so, but also because the *lex naturae* was a *lex*."

Long before the Roman conquest of Greece, the practical genius of the Romans made them acquiesce in the *jus gentium*. The Greek philosophy only gave

an impetus to its development. It supplied a theory for the *jus gentium*, which was profoundly affected by the conceptions which the Romans had about the *jus naturale*. This indirectly influenced the *jus civile* also. The *jus gentium* was often identified with the law of nature, because its attributes, which were reason, justice and equity, approximated closely to the ideas which the Romans held about the law of nature. In Walton's words,

"What the Jurists generally mean by *jus Naturale* is not any law which actually exists as a positive enactment or custom. It is a philosophical conception, borrowed from the Stoicks, of an ideal justice with which positive law ought, so far as possible, to be brought into harmony. When the writer or the judge declared that the law of nature was in favour of a particular determination, what he meant was that this determination struck him as equitable and right. . . . It is, in fact, the same thing as what English lawyers call equity, when they use that term in its general sense, and not as meaning a definite set of rules.

Cicero, following the Stoicks, speaks of *jus naturale* as an eternal and immutable law which it is sinful for the legislator to attempt to change. . . . But Ulpian does not dispute that a positive law may conflict with the law of nature, e.g., Natural law may be

said to forbid a creditor from exacting payment of his debt twice over, because his debtor is unable to prove that he has already paid it. It forbids Shylock from claiming his pound of flesh, even though a court would be bound to give judgment in his favour. A man is not to take unfair advantage even of his legal rights. He must act fairly and honestly with all men."

In this connection a word may be said as to Maine's dictum that "the *Jus Naturale*, or Law of Nature, is simply the *Jus Gentium* or Law of Nations seen in the light of a peculiar theory". What he means is that *Jus Naturale* and *Jus Gentium* are synonymous terms, depending entirely upon the point of view. If looked at from the angle of a Stoic, it is a law of Nature, while it is *Jus Gentium* from the point of view of a jurist. There are no doubt many points of resemblance between the two but he makes the mistake of treating them as synonymous. He overlooks, for example, the fact that slavery is an institution recognised by *Jus Gentium* but not by *Jus Naturale*, according to which all men are born free.

#### (d) *The Jurists in Rome*

The development of the Roman law in the hands of the Jurists began about the second century B.C. and ended about the middle of the third century A.D. This subject may be divided into three periods:

1. The period of the early jurists or *veteres*, B.C. 200 to B.C. 31.
2. The rise of the two rival schools of law, the Sabinian and Proculian B.C. 31 to A.D. 14.
3. The period of the later jurists or *jurisprudentes*, A.D. 14 to A.D. 250.

### 1. *The Early Jurists*

The beginnings of this class of jurists may, in fact, be traced to the fourth century B.C. What the College of *Pontifices* did officially, the jurists did unofficially. The study and profession of law were considered to be dignified. Hence the richer and higher classes of Romans took to the practice of law. Among them may be mentioned prominent men in the State like ex-consuls, ex-Praetors and so on.

The work of a lawyer in ancient Rome consisted of the following :

- (i) *Respondere*: to give legal opinions and advice to friends and dependents who were called *clientes*.
- (ii) *Agere*: to prepare documents and other papers necessary for filing a suit. In other words, the jurists took all preliminary steps required to prosecute a case in court, as does the solicitor in England.
- (iii) *Scribere*: to prepare legal documents in the proper technical form, a process called conveyancing in modern law.

- (iv) *Cavere*: to safeguard a client's interests in legal transactions by seeing that legal forms were properly employed.
- (v) To give legal instruction to students, which was done in an informal way. That is to say, the jurists discussed the questions arising out of a case with the students.

These jurists did not claim any remuneration or fee for the work. They appeared freely for their clients and also taught law gratis. It was considered a disgrace to do legal work or impart instruction for money. Their ideas were similar to the notions prevailing in ancient India, where it was considered very improper for the *guru* or teacher to receive payment for any teaching imparted to the pupil.

The influence of the jurists consisted in that, being men of influence, character and learning, their opinions in course of time began to influence the judge who was ordinarily a person not learned in the law. It also became customary for the praetor to construct his *edictum perpetuum* with the help of this learned body of lawyers. Thus, gradually the jurists began, first, to supplement, and then to supplant the members of the College of *Pontifices*, the original custodians of Roman Law.

Among the early Jurists may be mentioned :

(i) Tiberius Coruncanius (consul B.C. 280). He was the first plebeian Pontifex Maximus and the first plebeian who devoted himself to the public profession of law.

(ii) Qu. Mucius Scaevola (consul B.C. 95). He wrote a treatise on the *jus civile* in eighteen books. Here, for the first time, the private law of Rome was reduced to a system. It was arranged and classified according to the nature of the subjects dealt with. He abandoned the traditional legal arrangement. He not only discussed isolated questions of law, but was the first to define clearly the nature of legal terms, like will, legacy, guardianship, etc. From this time mere knowledge of Roman Law was beginning to develop into a legal Science.

(iii) Servius Sulpicious Rufus (consul B.C. 51). He was the first to write a commentary on the Praetor's edict.

We may here notice a peculiarity in the early Roman jurists referred to by Dr. Moyle :

"With them, we first get the idea of a scientific knowledge of the principles of law, or jurisprudence, a science which was entirely of their creation. Its favourable and symmetrical growth under their hands was due, in no small measure, to a peculiarity which is worthy of attention, namely, the complete adjustment which they effected between theory and practice, between principle and detail. The Roman jurists to whom the science of law is most indebted held themselves aloof from the vocation of the older *prudentes*, and left it to their own pupils, or to men of less repute than themselves. Their

theory was thus always full of life, their practice always in harmony with and conducted with reference to their principles. With them, theory and practice stood to one another in the only possible true relation, that each paid due regard to the other: thus the practitioner could not reproach the scientific jurist with being a mere theorist or dreamer, or the scientific jurist the practitioner with having nothing but a beggarly account of scraps and fragments."

#### 4. THE IMPERIAL PERIOD

This period may be divided into

- (1) The Principate from B.C. 31 to A.D. 284.
- (2) Absolute Monarchy from A.D. 284 to A.D. 565.

##### *(1) The Principate*

"From the day of the battle of Actium B.C. 31 the Roman world lay at the feet of Octavian (Augustus).<sup>1</sup> Warned by the fate of his uncle, the victor, while securing his personal supremacy, conciliated the people by an ostentatiously assiduous regard for the forms of popular government." It was the time in

<sup>1</sup> To quote Nasmyth, "In order to avoid exciting alarm he lived with the simplicity of a private citizen . . . He exerted himself in correcting abuses, both public and private . . . He gave a new form to the senate; he enacted laws for the improvement of the law and the morality of the people; he introduced discipline into the army . . . He so greatly improved the city that it was said that "he found it of brick and left it of marble,"

Roman History when in reality the Roman Republic ended although in the matter of form the old Republican institutions continued. The Senate, the *Comitia Tributa*, the Roman Consuls, and other Republican Magistrates did exist, but they were mere shadows of their former glory, while all their authority was vested in the hands of the Emperor. He was the Consul, the *Pontifex Maximus*, and the Commander-in-Chief. In Rome the Imperial system was built up only gradually. In theory all that happened in the time of Augustus was what had happened many times before, namely the creation of a new magistracy, the *Imperator* or Emperor, the only difference being that the latter was elected for life. Further, the powers given to him were ampler than those conferred on any single magistrate ever since the foundation of the Republic. Really speaking, the sovereignty of the people existed only in name. The *Comitia Centuriata* and *Comitia Tributa* still passed the *leges*, but it was the Emperor who introduced the law. He had also the power of the Tribune to veto any proposal made. The Senate had increased powers under the first few Emperors. As the powers of the *Comitia* decreased, owing to its unwieldly character, those of the Senate increased, so that the régime established by Augustus was sometimes called 'dyarchy', i.e., government by the Emperor and the Senate, in contrast to the later absolute monarchy of Diocletian and Constantine.

The Senate was given the power of administering certain provinces which were called the Senatorial or

Popular provinces to distinguish them from the Imperial provinces. The ordinances of the Senate called the *Senatus Consulta*, which were at first merely administrative orders, acquired the force of law. But by the end of the second century all other forms of legislation had vanished, and the Emperor's laws or *Constitutiones* were the only sources of law.

The power of the praetors to issue edicts was not affected by the establishment of the Principate. But they lost much of their independence and the spirit of initiative so that their *edictum perpetuum* became more and more stereotyped.

When the Empire was established, the national genius of the Romans for law found its full scope. Many of the jurists, in addition to the practical side of their work, devoted themselves to the task of evolving legal principles. Herein lies a point of contrast between the development of the English and the Roman law. The former has been developed by means of case law, where principles are discussed mainly with reference to the case in hand without any relation to other principles not covered by the facts of the case. This method is not conducive to a full development of law. But in Rome the lawyers by a discussion of hypothetical cases developed a sound and uniform system of law, the legacy of Rome to the World.

In this period, while the praetors declined in importance, the jurists were at their best. In Rome there were two ways by which a man of talent might become a leader of men, namely, politics and law. The

former practically became a closed door at this time, hence from now the aristocracy of intellect gave itself up more and more to law and it may be said that Roman Law was developed largely, not in the law courts, but in the halls of these jurists.

The Emperor, Augustus Caesar, being a shrewd statesman, thought it worth his while to win the support of such an influential body of men—the *Veteres*. So, it is said, in order to gain the favour of these jurists, Augustus instituted the *jus Respondendi*. He ordered that all *responsa* or opinions of the jurists should be given under the guarantee and with the sanction of the Emperor. By this means it was possible for persons, who were not *pontifices* to deliver authoritative *responsa*. Henceforth the College of *Pontifices* ceased to play any part in the growth of Roman law, and the Emperors together with the jurists became the chief agents in its further development.

#### THE SABINIAN AND PROCULIAN SCHOOLS OF LAW

One of the points of importance in the development of law in the reign of Augustus is the rise of the two Schools of law—The Sabinian and the Proculian. The name of the founder of the one was Labeo, and of the other, Capito. Both lived during Augustus' régime. The former was a jurist of progressive ideas and had an independent outlook, while the latter was conservative and a supporter of the Court. It is curious to note that the names of the two Schools, which

these founded, were given after their respective pupils Proculus and Sabinus. Sabinus, who was an adherent of Capito, lived during the rule of the Emperor Tiberius; whereas the Proculians derived their name from Proculus who lived during Nero's sovereignty. It is not possible to say with certainty what really were the points of difference between these two schools. The only thing that can be said definitely is that Labeo and his school exerted a great influence over the Sabinians. Labeo was the author of many new classifications, divisions, and definitions which helped to a great extent in placing the theory and practice of law on a clear and firm footing. It is generally believed that he was the first to recognise the well-known division of all actions into '*actiones in rem* and *actiones in personam*'. In the field of jurisprudence he was an analogist. He was the first to adopt the comparative method in law.

Neither of them ever founded a regular school themselves. They did give legal instruction, but only after the model of the early jurists, whose method was to give answers to questions in the presence of their pupils, now and then arguing with them, but seldom imparting regular tuition in the form of connected lectures. It was only from the time of Sabinus of the School of Capito that we get for the first time in Roman legal history regular organisations, like the Greek Schools of Philosophy. These were institutions presided over by professors of law, where the students lived a corporate life, and

paid fees for the legal instruction imparted to them. For nearly two centuries the two schools continued to mould and develop the law until we come to the time of the five great classical jurists.

Tiberius succeeded Augustus. The importance of his reign in legal matters is that he gave a settled form to the *responsa* of the jurists. It became usual for the Emperor to confer the *jus Respondendi* on certain distinguished jurists. It was the power given to the jurists of delivering opinions or *responsa* binding on the judge; these had to be given in writing. The judge had to decide in accordance with the written *responsa*, unless a different view of another jurist was submitted by the other party. It became customary soon afterwards to extend the same authority to previous opinions of learned jurists, even though they were not written down and sealed in the proper official form. This practice was especially confirmed by a *rescript* of Hadrian who enacted that the *responsa prudentium*<sup>1</sup> should have the force of law.

In A.D. 131, Hadrian ordered that the edicts of the *praetors urbanus* and *peregrinus* called the *edicta perpetua* be codified into one. The labour of reconciling them was accomplished by a great jurist. The Emperor enacted that the latter code should be part of the civil law of Rome, and that no more changes should be made in it. From now the *edictum perpetuum* became, in fact, a perpetual edict

<sup>1</sup> *Responsa*—opinions. *Prudentium*—of the jurists. *Responsa prudentium*. the opinions of the jurists on a point of law.

in the ordinary sense of the word. It was also called the *Edictum Hadrianum* or *Julianum*. It was considered to be a standard work, and Ulpian, Paul, and other eminent jurists have written commentaries upon it.

#### THE CLASSICAL JURISTS

Between the reigns of Hadrian and Alexander Severus there flourished five distinguished jurists, Papinian, Ulpian, Gaius, Paulus and Modestinus. Among these Papinian, Ulpian and Gaius are the most important. They lived in the second century and the first quarter of the Third Century A.D.

#### PAPINIAN

Papinian lived in the time of Septimius Severus and Caracalla<sup>1</sup> (A.D. 211 to A.D. 217). He held the office of the supreme judge, or the *praetorian prefect*. He met with a violent death at the hands of the latter Emperor. He is regarded as the greatest of the Jurists. His work is largely incorporated in Justinian's Digest. He is the author of the following books :

- (a) Books of Questions.
- (b) Books of Answers, and
- (c) Books of Definitions.

<sup>1</sup> An important event in his time is the granting of Roman citizenship to every citizen in the Roman Empire.

## ULPIAN

Ulpian is the author of several works, which he wrote during the reigns of Severus and Caracalla. Next to Papinian, Ulpian holds the highest rank among Roman Jurists, and the Digest of Justinian contains many more extracts from his books than from those of any other. He was also a *praetorian prefect*, and like Papinian he was murdered in A.D. 288.

## GAIUS

Little is known about his life. He was probably born in the time of the Emperor Hadrian, and wrote during the reigns of Antonius Pius<sup>1</sup> and Marcus Aurelius. It is said that he was a professor of law in one of the law schools in the Roman Empire, and that he was an adherent of the school of Sabinus. He wrote, among other books, a commentary on the XII Tables and the Edicts. But he is best known by his Institutes, written about A.D. 161. The Institutes of Justinian may be said to be only a revised edition of them. Owing to the Institutes of Gaius, we are able to compare the Roman Law at the classical period<sup>2</sup> with the law in the sixth century A.D., when Justinian lived. It was he that for the first time,

<sup>1</sup> "It is said of this man that he was the most virtuous of all the Roman emperors and one of the noblest beings that ever lived. He lived as a private citizen accessible to all. He granted toleration to the Christians and protected them."

<sup>2</sup> i.e., the period between the second century and the middle of the third century A.D. when the great classical Roman jurists lived.

divided the whole field of law, into the law of persons, things, and actions, and this division was later adopted by Justinian.

These classical jurists who may be said to be "the great lights of Jurisprudence for all time" reconciled the opposition between the two schools, the Sabinian and the Proculian, and their labours resulted in the fusion of the *jus civile* and *jus gentium* with the new laws promulgated by the Emperors. In Dr. Hunter's words,

"From the manner in which the jurisconsults modified the law, it is extremely difficult to specify the changes that ought to be ascribed to them. By extensive and restrictive interpretation, by revision of earlier interpretations, and even by suggestions contrary to the terms of the existing law, they laboured to bring the older law into closer correspondence with the changing needs of their time. They supplemented the laws by numberless new doctrines. The Digest illustrates on every page how they cast the law into general statements or rules of remarkable precision and clearness (*jura condere, leges conscribere*). The more eminent jurisconsults, as members of the Emperor's Privy Council, contributed materially to the shaping of Imperial legislation. The great bulk of Roman Law, and all that is most valuable in it, is due to the jurisconsults."

After the classical jurists, Roman Law began to decline. It had reached its zenith, and the era of creative genius was succeeded by the labours of the compilers. It was some time after the death of the jurist Modestinus (about A.D. 244)<sup>1</sup> that it ceased to progress on the old lines. Up to the first century of the Imperial Period, Roman law had been steadily progressing; during the second century A.D. it rose to the height of its excellence, and from the third century onwards it began to deteriorate. The treasure of Roman Jurisprudence now passed into the hands of the Emperors. Henceforth the Roman Emperor alone gave "*responsa*" called "*rescripta principis*".

Speaking about the great jurists and their contribution to the science of law Dr. Moyle admirably states,

"In some respects their legal method left nothing to be desired. But from another point of view the Roman jurisprudence is more open to criticism. The cause may be disputed; it may have been the backward state of general scientific knowledge or the exclusion of the jurists from all other departments of political life: but certain it is that their absorption in their peculiar study blinded them to the fact that law is but one of the agencies by which the life of a nation is developed, and that it stands in close relation to other influences all of which must

<sup>1</sup> It will be observed that the *jus Respondendi* was no longer conferred after the end of third century A.D.

play their part in duly promoting the welfare of the social organism. These other influences—literature, what are now called the moral or social sciences, art, and we may perhaps add, religion—they left more or less out of sight, or, at any rate, failed to see the inevitable correlation between them and their own favourite subject, to appreciate the function of philosophy as the common element, the connecting link, between the various branches of human thought. . . . To them Jurisprudence was philosophy and all philosophy . . . and the failure to distinguish sufficiently between jurisprudence and the other sciences, notably ethics, resulted in logical faults, especially of definition, which mar in no small degree the excellences by which the Roman Law is on other grounds distinguished."

In the early days of the Empire, the Emperors retained the republican forms of Government at least in form. In the later Imperial period, even this semblance of republican rule was thrown overboard, and virtually, from Diocletian (A.D. 285 to A.D. 305) onwards, the Empire became an absolute monarchy.

Diocletian is one of the most remarkable emperors that ever lived. He may be called the philosopher-emperor. In A.D. 305, he voluntarily abdicated and retired into private life, and when one of his colleagues tried to induce him to resume the throne which he had voluntarily vacated, he declined to

accede to his entreaties. In the words of Nasmith, " Maximian grew weary of private life and sent soliciting Diocletian to resume the reins of Government. Diocletian, with a smile of pity, calmly said : ' If I could show Maximian the cabbages I have planted with my own hand at Salona, I should no longer be urged to relinquish the enjoyment of happiness for the pursuit of power ' ".

After Constantine the Great, (A.D. 306—337) there were two Senates, one at Rome and the other at Constantinople, both without any real power, and the ancient magistrates were also replaced by imperial functionaries. The period from Constantine to Justinian was eminently a period of direct imperial legislation. Again, during the later Imperial period, the Emperor was also the supreme appellate authority in judicial matters. In this capacity, his decisions, in particular cases, were called *decreta* : his legal opinions *rescripta*, and they were analogous to the *responsa prudentium* of the jurists, which were given in answer to questions of law put by the magistrates of every class from the provincial governors downwards and also by private individuals. The former were called *epistolae*, and the latter, *subscriptiones*. As the head of the administrative machinery, he sent instructions to the various pro-consuls and other officers in the provinces, which were known as *mandata* : and as the sole legislative power in the State, he issued public ordinances, *edicta*. The general name for *decreta*, *rescripta*, *mandata* and *edicta* is *constitutiones*.

A word may here be said of the influence of Christianity on Roman Law. The Emperor Constantine<sup>1</sup> established Christianity as the religion of the State, and its gradual spread among the people gave rise to a change in their attitude towards life which led to beneficial results in law. The influence of this religion was partly direct and partly indirect. The rise of religious corporations with power to hold property, the division of the Christian priesthood on a hierarchical basis, the distinction between Christians and non-Christians and the creation of Episcopal Courts, did influence Roman Law directly. Its influence was much more noticeable in the changes in the Roman law effected by its humanising spirit, which, by Justinian's time, had largely influenced some branches of law, particularly marriage and succession.

At the beginning of the fifth Century A.D. the Roman Empire became divided into two halves, the Eastern and Western. From this time, the centre of gravity was shifted from Italy to Greece, and the Emperors of the East ruled their empire with Constantinople as their capital.

One event of great importance in Roman legal history was the enactment of law called the Law of Citations<sup>2</sup> in A.D. 426 in the reign of Theodosius II (A.D. 408—450), the Emperor of the East. He enacted that the works of the five great jurists,

<sup>1</sup> He was the first Emperor to adopt the Christian faith. Before his time Christianity was severely persecuted and, strange as it may seem, even such an enlightened emperor as Dcletia proved to be one of its worst enemies.

<sup>2</sup> The Law of Citations, however, was repealed by Justinian.

Papinian, Ulpian, Gaius, Paul and Modestinus should be of the highest authority and that the opinion expressed by the majority should bind the judge. If they differed on any particular point and if they were equally divided, Papinian's view should prevail. If he was silent, the judge should use his own discretion. He also published in A.D. 439 a collection of the *constitutiones* of the Emperors (from the time of Constantine onwards) which was declared to be the sole source of Imperial Law. It was called the Theodosian Code<sup>1</sup> and people were forbidden to write any notes on it by way of commentary.

#### THE EMPEROR JUSTINIAN

His title to fame rests on the fact that he "conceived a comprehensive project of legal reform". It is because of his efforts that Roman Law has come down to us substantially in the same form as it was in the 6th Century A. D. To his credit must be ascribed the following books which have made his name immortal.

(a) The first Code. It was compiled in A.D. 529. It embraced the *Constitutiones* from the time of Hadrian down to the date of its promulgation. Justinian gave legislative force to this compilation and abolished all preceding collections.

<sup>1</sup> Before this code, there were two others by private individuals, namely, the Gregorian and Hermogenian codes, of which nothing definite is known.

(b) The Digest. This consisted of a selection from the writings of the later jurists, comprising all that was most valuable in them and forming a compendious exposition of the law. This work was entrusted to a body of jurists (sixteen in all) with Tribonian as the president. In the course of their work, the commissioners seem to have been embarrassed by some controversies among the ancient jurists, and in order to settle these the Emperor gave some authoritative decisions which were issued between A.D. 529 and 531. These were known as the *Quinquaginta<sup>1</sup> Decisiones*. He gave to this compilation the force of law in A.D. 533. The Digest, otherwise called the *Pandects*, was divided into fifty volumes and it was arranged after the model of the *edictum perpetuum*. Nearly half of this work consisted of literal extracts from the writings of the classical jurists, especially of Ulpian and Paul.

(c) The Institutes. It is an elementary book on Roman Law intended mainly for the use of students. He gave legislative force to it in A.D. 533.

(d) The second Code. Owing to the publication of the *Pandects* and the fifty decisions, it was thought necessary to revise the Code so as to bring it into harmony with them, and a commission of four jurists, under the presidentship of Tribonian brought out the revised Code, which received legislative sanction in A.D. 534. It is this Code that we have

<sup>1</sup> Fifty.

now, the previous Code of A.D. 529 having been suppressed, and no trace of it is left.

(e) The Novels<sup>1</sup> or supplementals: They are his legal reforms between A.D. 534 to A.D. 565 numbering 165 in all.

The whole collection of (1) The Digest, (2) The Institutes, (3) The Second Code and (4) The Novels is called the *Corpus Juris Civilis*<sup>2</sup>.

Thus, in the words of Maine, "the most celebrated system of Jurisprudence known to the world begins, as it ends, with a Code."

## II. ROMAN LAW SINCE JUSTINIAN

Before we proceed further, we may consider for a moment the history of the Roman Empire ever since Theodosius I divided it between his two sons in A.D. 395. From that time it was split into two Empires (1) of the East, with Constantinople as the capital, and the other (2) the West, with Rome as its capital. Strictly speaking, there were not two, "there was one, though there might be two emperors."

We may now deal with the barbarian invasions which began to overwhelm the Western Empire during the fourth and the fifth centuries A.D. Chief among these invaders were the Vandals, the Franks, and the Goths, all belonging to the Teutonic race.

<sup>1</sup> It will be observed that the law relating to Intestate succession is one of the most important topics, among others, dealt with in the Novels.

<sup>2</sup> *Corpus*—body, *Juris*—of law, *Civilis*—civil; i.e., a body of civil law.

As the rulers were getting weaker and weaker, the depredations of these tribes, north of the Rhine and the Danube, into Roman territory became more and more frequent, until at last the western empire quietly vanished out of political existence in A.D. 476, when the German king Odoaker (Odoacer) ruled Italy, at the Senate's request, as governor on behalf of the Eastern emperor. "There was 'no catastrophe, no down fall' of the empire in the usual sense. The dominion of Rome, apart from the Byzantine<sup>1</sup> Empire could not be conquered because it had already been absorbed. The older population had been replaced by a new set of peoples, mostly of German or Teutonic race, and so the grand fabric faded away."

The history of the Western Roman Empire from A.D. 476 may be briefly told. For a thousand years from then, Europe witnessed the occupation of the western part of the Empire by "new nationalities", which constituted the beginnings of modern European states. Among these "new nationalities" special mention must be made of the development of Germany in Central Europe. In the year A.D. 919 Henry I laid the foundations of a German Monarchy<sup>2</sup> by his strong and able rule. On his death he was succeeded by his son Otto I in A.D. 936 who carried on the work of his father in unifying all Germany into one nation. Further, he was able to

<sup>1</sup> i.e., the Eastern Roman Empire.

<sup>2</sup> Before A.D. 919 there was trouble and confusion in Germany as it was divided among a number of turbulent chieftains who were at war among themselves.

extend the German sway beyond his own territory over the lands of the Slavs. Elated with his success, he conceived the idea of re-establishing a single Empire and hence he crossed the Alps and marched into northern Italy where he was crowned King of Lombardy and later on as "Roman Emperor" by the Pope. Henceforward the German kings claimed the prerogative of being the Emperors of Rome, the "successors of Augustus, Constantine and Justinian". The Empire which they re-established was known as the Holy Roman Empire<sup>1</sup> of which it has been said that it was "well named save in three points, that it was not Holy, not Roman, not an Empire". At last, early in the 19th century, it ceased to exist after the conquests of Napoleon.

All this time while the Western Roman Empire was passing through various vicissitudes of fortune, a Government continuously descended from that of Rome was carried on at Constantinople and Roman Law was taught and practised there up to the year A.D. 1453, when that city fell into the hands of the Turks. Up to that period, Roman Law remained in the Eastern Roman Empire substantially the same as it was in the time of Justinian in the 6th century A.D.

In the old Western Empire, however, Roman Law continued to be known and used only in certain portions of Western Europe. About A.D. 1100,

<sup>1</sup> It will be observed that the Holy Roman Empire which the German Monarch Otto I claimed to have re-established in A.D. 962 and which had its capital at Vienna, had nothing in common with the old Roman Empire which ended in A.D. 476.

a school of learned scholars sprang up, especially at Bologna, called Glossators from the marginal notes or *glosses* they made on their copies of the *Corpus Juris Civilis*. They began to study Roman Law assiduously and, wrote commentaries on the text of the *Corpus Juris*, which, as a result of their studies, came to be recognised as the most important source of private law in Italy, in Southern France, and from the end of the thirteenth century, in Germany. In course of time, their labours tended so to multiply the commentaries that they ran the risk of losing sight of the text itself. Besides they lacked the true critical spirit. They had far too great a respect for the written text of the Roman Law to look at it in the proper perspective. In other words, they paid more regard to the letter than to the spirit, forgetting that the Roman Law of Justinian was separated from their own time by a lapse of more than six centuries. They represent the *Analytical School of Jurisprudence*. They are also said to belong to the *School of Bologna*.

Next, at about the end of the 15th and the beginning of the 16th century A.D., the French scholars began the scientific study of Roman Law. With the Renaissance came a revival of the study of the classical literature of Greece and Rome and with it an intensified study of Roman Law. These scholars belonged to the *School of Bourges* and were the pioneers of the synthetic school. The Glossators took a text from the *Corpus Juris* and commented on it in a hair-splitting manner; whereas these scholars made

generalisations "out of a multitude of single instances". Thus their work was synthetic and constructive.

After this came the German School. The intensive study of Roman Law in Germany was due to the fact that it was virtually the law in that country until recently. Here we may mention Savigny, the founder of the historical School of Jurisprudence, early in the 19th century A.D. In summing up the subsequent fate of Roman Law, Sohm remarks, "Such is the position of affairs at the present time. The *Corpus Juris Civilis* has now ceased to have any force as an actual code of law, but it will continue to hold its own as a subject of scientific study. As a piece of legislation the system of Roman private law was destined to pass away ; as a work of art it will endure for all time."

### III. THE INFLUENCE OF ROMAN LAW ON ENGLISH LAW

Britain came into contact with Rome when Julius Caesar conquered England in B.C. 55. Till A.D. 455, when the Romans withdrew from Britain, she was governed by Rome. During that period particularly during the second and third centuries A.D., Roman Law made rapid progress in that country. In speaking about the Roman evacuation of Britain, it is well to remember that, "It was not Britain that gave up Rome, but Rome that gave up Britain". England was invaded by the Germanic tribes, the Angles and the Saxons, who introduced their native customary law of Teutonic origin, so that from the 5th century A.D., until the

Normans became masters of England under William the Conqueror in A.D. 1066, it seemed as if England was in great peril of losing the civilising influence of Roman Law.

With the Norman conquest came also the introduction of Justinian Roman law into England, which had a profound influence in moulding the English Common Law. From A.D. 1150 to about A.D. 1300 Roman Law influenced English Law to such a great extent that we may call this period the "Roman epoch of English legal history."

This was specially due to the fact that the Prime Ministers of the kings of England were all ecclesiastics, members of the Roman Catholic Church, who were well grounded in the principles of Canon law, which was only an "ecclesiastical offshoot of Roman law". After the 13th century A.D. a reaction set in against Roman law. This bias led to the renouncing of Roman Law, at least openly. For, although the English lawyers and judges outwardly professed hostility to it, in fact, they resorted to its principles, whenever it was found necessary to do so. This prejudice continued even up to the end of the 19th century A.D. "Consequently in later English legal history even to comparatively modern times, progress in English law has frequently been paradoxical; namely to take from Roman law new material to be incorporated in English law or to advance its welfare, and at the same time not to acknowledge the Roman law source, or sometimes—what is far worse—even to deny that English law

was ever influenced by Roman law. When judges decided cases on principles taken from the Roman law, the theory of the Common Law was that the magistrate's decisions came from his inborn wisdom : which theory was not often upset by appropriate mention of the Roman law—the only law known as a system of law to the medieval world as a source of their information. All this has made the English reception of Roman law limited in character as compared with the Continental European reception."

To begin with, the very first book on Common Law called Glanvil, written in the 12th century A.D., shows in a marked degree traces of its author's familiarity with the rules of Roman law. The same remark holds good to a greater extent of Bracton's well-known book "*De legibus et Consuetudinibus Angliae*". Bracton not only took the leading notions, classifications, and terminology from Roman Law, but in many places also freely borrowed from the text of *Corpus Juris* itself. Thus the principles of Roman Law gradually permeated into Common Law, and through Blackstone into every modern book on the subject. English Law has been much influenced by Roman Law, especially in the laws of Succession, Contracts, Easements, Mortgages and Adverse Possession.

#### IV. DIVISIONS OF LAW

The *Institutes* of Justinian divide all law into two parts, *viz.*, public, called *jus Publicum*, and private, *jus*

*Privatum.* " *Jus Publicum* is law relating to matters affecting the Roman State : *Jus Privatum* that which concerns the interests of private individuals." Public law (*Jus Publicum*) is again divided into three divisions viz., (1) Constitutional Law ; (2) Criminal Law ; and (3) the law relating to religion, e.g., priesthood and *sacra*. The *Institutes* deals mainly with private rather than public law although it contains a chapter on the law of crimes which belongs to public law<sup>1</sup>.

Both Gaius and Justinian divide Private Law into the Law of (1) Persons<sup>2</sup> (2) Things,<sup>3</sup> and (3) Actions.<sup>4</sup> The basis of this classification is not clear. There are two opinions on this subject. First, some contend that the object of this division was to divide the law into three branches. This view is acceptable to modern critics. On the other hand, others hold that it was not intended to divide the law into three parts but only to indicate that every principle of law has three aspects, namely, (a) the persons affected by it, (b) the rights and duties it created, and (c) the remedies.

The second theory is not generally accepted. The main objection to it being that the Romans at the time

<sup>1</sup> Again Roman Law is divided into (1) written law (*Jus Scriptum*) and (2) unwritten law (*Jus Non Scriptum*). According to Dr. Moyle, written Law consists of the law, which is committed to writing, e.g., *leges*, *edicts*, while unwritten law is not written, e.g., customary law. Other authorities, however, take a different view. But all are agreed that in Justinian's time written law consists of: (a) *leges*, (b) *plebiscita*, (c) *senatus consulta*, (d) *constitutions principum*, (e) *edicta magistratum*, and (f) *responsa prudentium*.

<sup>2</sup> *Jus quod ad personas pertinet*, i.e. the law pertaining to persons.

<sup>3</sup> *Jus quod ad res pertinet* i.e., the law pertaining to things.

<sup>4</sup> *Jus quod ad actiones pertinet* i.e., the law pertaining to Actions.

of Gaius were not as familiar with abstract conceptions of rights and duties as we are today.

In fact, there was no need for this three-fold division. Two would have been enough, *viz.*, the law of (1) Persons and (2) Things. For, the Laws of Things and Actions could be grouped into one, as they both deal with the modes of acquiring things. To quote a learned writer, "This three-fold division of Roman Private Law seems to have been traditional among Roman lawyers, and was probably inherited from the old Pontifical jurisprudence (*Karlowa*) ; however, it was probably confined to institutional treatises and primers, and cannot be regarded as of fundamental importance, seeing that neither the XII Tables, the Praetor's Edict, the Digest, nor any of the Imperial Codes were arranged on this principle."

Here we may point out that this three-fold arrangement may be looked at from another aspect. We mean the partiality of the ancient Romans for certain numbers which they believed to have mystical value. In the words of Dr. Goudy,

"In modern times, at any rate, among European nations, one does not attach any particular significance to numbers as such, outside the realm of mathematics. One does not at all regard them as influencing actions or events either in public or private life. Least of all have modern writers, if we except perhaps Hegel, been consciously influenced by them in the composition of

their writings. What literary or scientific author now-a-days, in dividing his treatise into parts, books, etc., or dividing his subject matter into heads and categories or genera and species, would attach any special importance to what the number of these might be? But in former times it was different: to the ancients certain numbers had a mystical value or fixed traditional force, and ancient writers frequently made the distribution of their subject-matter, as well as the external arrangement of their works, depend upon their accordance with one or other of these numbers. The influence of this symbolism, or whatever it be called, can be demonstrated to have existed, in greater or less degree, among all ancient nations with whose culture we are acquainted, especially the Hindus, Hebrews, Egyptians, Greeks, and Romans. The numbers 3, 4, 7, and 12 seem to have been above all sacred, but 9 and 10 were also universally symbolic."

To illustrate the partiality of the Roman Jurists for the tripartite classification, the following may be taken as examples:

1. The subject matter of private law relates either to (a) persons, (b) things or (c) actions.
2. Private Law is composed of (a) *Jus naturale*, (b) *Jus gentium*, and (c) *Jus civile*.

## ROMAN LAW

3. The precepts of law are three, namely " (a) to live honestly, (b) not to harm another, and (c) to give every man his due."

## BOOK I

### THE LAW OF PERSONS

#### I. ROMAN LAW OF SLAVERY

JUSTINIAN defines slavery as "an institution of *jus gentium*<sup>1</sup> by which one man is made the property of another contrary to nature. Slaves (*servi*) are so-called because military commanders order their captives to be sold, and so are used to preserve them alive (*servare*) instead of killing them. They are also called *mancipia* because they are taken from the enemy by the strong hand (*manu capiuntur*)."<sup>2</sup> The institution of slavery is an ancient one. Hence we find laws concerning it in most of the ancient systems—Hindu and Roman. It forms part of Muslim Law also. But, as slavery is made a criminal offence by the Indian Penal Code, that portion relating to slavery in Hindu and Muslim Law is no longer in force in India. England was the first country in Europe to wage war against the slave trade, which was made illegal in 1807.

<sup>1</sup> The Roman jurists recognise in theory that all men are born free by law of nature, and they consider that the institution of slavery is due to the law and general custom of nations called *Jus Gentium*. This is one of the points in which *Jus Naturale* and *Jus Gentium* differ.

In Roman Law all persons are divided into two main classes :

1. Slaves, and
2. Free-born persons.

#### 1. SLAVES

There are no distinctions among slaves, all of them being considered to be of the same inferior status. For most purposes, legally speaking, they are regarded not as human beings but as things.

#### 2. FREE-BORN PERSONS (INGENUI)

There were several divisions among men born free according to the rank they occupied in society. First of all, there was the Roman citizen who had the largest rights. He had the *jus commercium*, or the right to enter into contracts and own property in Rome, and this included the right to make a will and to be a beneficiary under a will. He had also the *jus connubium* or the right to contract marriage recognised by the Civil Law. The Roman citizen had also various political rights such as the right to vote, to occupy important offices in the State, etc.

Next in rank was the citizen of a Latin colony who, although a free person like a Roman citizen, had not the same status as the latter. He had only the *jus commercium* but neither the *jus connubium* nor the political rights which the Roman citizen had.

The Latins themselves were divided into several classes:

- (1) *Latini Prisci*.<sup>1</sup>
- (2) *Latini Colonii*
- (3) *Latini Juniani*.<sup>2</sup>

In Italy the distinction between a Roman and a Latin ceased after the Social War B.C. 91—89 by the Statutes *Lex Julia* (B.C. 90) and *Lex Plautia Papiria* (B.C. 89). The effect of these enactments was to admit the Latins to full Roman citizenship. Later, when by an edict of the Emperor Caracalla all free-born persons in the Roman Empire were given full Roman citizenship, the distinction between the Roman and Latin ceased even outside Italy. Finally, Justinian formally abolished all distinctions between freemen and freedmen and declared that the latter should be Roman citizens. There were thus only two classes of persons in his time either free or slaves.

#### MODES BY WHICH PERSONS BECAME SLAVES

Men became slaves in ancient Rome in two ways under (A) *Jus Gentium*, and (B) *Jus Civile*.

##### A. *Jus Gentium*

First under the *jus Gentium*, by being taken prisoners of war who were considered to be the absolute

<sup>1</sup> The *Latini Prisci* were the original members of the league and the early Latin colonies. They had certain advantages, which the *Latini Colonii* had not, and it may be that *connubium* was one of them.

<sup>2</sup> They were a class of freed-men who did not become Roman citizens owing to some defect in manumission.

property of the conquerors. These captives were either sold to the public by auction or were retained for the service of the state.

(2) All the children of a female slave were also slaves and belonged to her master, irrespective of the status of the father. Later, this rule was not strictly enforced and the child was considered free-born if its mother were freed any time between its conception and birth.

### B. *Jus Civile*

There were several ways by which a person could become a slave at different periods in Roman Legal History. Many, however, became obsolete before Justinian's time. In the Republican period—

(1) By suffering *capitis deminutio maxima*, e.g., a Roman citizen became a slave if convicted by a Roman Magistrate for a heinous offence.

(2) Parents were allowed to sell and give their children away into slavery.

(3) Originally a thief could be sold as a slave but not under the later law.

(4) Under the Twelve Tables, insolvent debtors could be sold into slavery beyond the river Tiber.

(5) Persons evading taxation or military service or inscription on the census were liable to be enslaved. In the imperial period,

(1) If a free Roman citizen above the age of 20 fraudulently allowed himself to be sold as a slave, he lost his liberty as a consequence.

(2) By the S. C. Clodianum (A.D. 52) a free woman who persisted in co-habiting with a slave, despite the prohibition of his master, was to be awarded after three warnings to the owner of the slave, as a slave, and her children should also share the same fate.

(3) If a person were condemned to death or to labour in the mines, he lost his freedom, and he was said to be a slave of punishment (*servus poenae*). He had no master.

(4) A patron could reduce his freed-man back to slavery for gross ingratitude.

(5) Constantine allowed parents to sell their children into slavery as soon as they were born in case they were too poor to maintain them. He, moreover, gave them a right to redeem them if their pecuniary circumstances improved.

Justinian, however, abolished (2) and (3) and retained the others.

#### STATUS AND CONDITION OF SLAVES

During the early years of the Republic, there were not many slaves in Rome, but gradually as the Romans extended their territory beyond Italy, the number increased considerably and they were sold in the public markets. In course of time, the wealth of

the Romans consisted largely of slaves, some of whom even belonged to aristocratic families, and they were in early times, generally treated with kindness and respect. Many of them were skilled artisans, professional men, whose skill yielded large profits to their owners.

All slaves were under the absolute control of their masters who had unrestricted power of life and death over them. They could be transferred like goods and chattels to any one by sale, gift, or legacy. They had no political or civil rights, and were regarded in law, in most respects, as things rather than as persons. Nevertheless, Roman Law recognised the slave as a human being to a limited extent. Thus, for instance, (1) he could become a free Roman citizen on manumission, (2) a master could institute him as his heir, (3) the master was said to exercise *potestas* over him, an expression which could be used only in relation to human beings, (4) he was recognised as capable of committing crimes just like any free person. The question is, "Was the Roman slave a thing or a person? The answer is, he was both. He could be owned and as such was a *res*. But he was a human being and as such was a person, for the idea that personality implies 'a being or group capable of legal rights and duties' developed slowly and took shape only in the Byzantine period under the influence, it is said, of ideas derived from theology."

But towards the close of the Republic and in the early Imperial period, the Roman lawyers studied

Greek Philosophy and were influenced largely by the ethical doctrines of the Stoics. As a consequence of these doctrines several laws were enacted during the Empire to restrict the power of the masters over the slaves in order to protect them from cruel treatment. Under the Statute *Lex Cornelia de sicariis* (B.C. 8), any person who killed the slave of another without lawful excuse was guilty of criminal homicide. Prior to this it was merely a delict. A *Lex Petronia* of about A.D. 79 forbade the owner to expose a slave to wild beasts without the permission of a magistrate. By an order of the Emperor Claudius (A.D. 41-54), if any master abandoned his slave as old or infirm, the latter should be free and should have the status of a Latin. He also decreed that it was murder to kill one's own slave who fell ill. Hadrian prohibited slaves from being put to death without a judicial sentence. Again by a constitution of the Emperor Antoninus Pius a master was held to be guilty of murder who put his slave to death. Further, he directed the Governors of Provinces to enquire into the complaints of slaves who took refuge in temples or behind the statues of the Emperors, and he forced masters who were found to have ill-used them to sell them to more humane persons. The philosopher Seneca was of opinion that in public auctions brothers ought not to be parted. The Emperor Constantine, following this principle, enacted that children and parents, and wives and husbands, should not be separated and sold to different people, and he allowed the master to

exercise his right of bodily chastisement only to a limited extent. This was also the law in Justinian's time.

By such enactments the condition of the slave was improved to some extent, but the master still held a power of bodily correction over him which was practically unlimited and was often abused. In the words of Lord Mackenzie,

"Historians and poets make us acquainted with the dark side of slave life, and draw a lamentable picture of the cruel treatment to which this unhappy class were exposed. The Roman slaves were too often despised by rich and poor, and when they grew old, were sometimes left to die of starvation. The jaded voluptuary whose property they were, could scourge, brand, or torture them at pleasure; and even in the Augustan age we read of Vedia Pollio having ordered one of his domestics, who had broken a crystal goblet, to be cast into his fish-pond to feed his lampreys. Female slaves were often barbarously punished by their mistresses from mere caprice, or for the most venial mistakes in arranging the mysteries of the toilet. Ulpian informs us that a Roman damsel called Umbricia was banished for five years by the Emperor Hadrian for atrocious cruelty to her female slaves."

The slave could own no property. All that he had became *ipso facto* the property of the master.

Even so he was allowed to manage independently certain property of his master's called *peculium*<sup>1</sup>. It had become customary for masters to allow their slaves to accumulate gifts or their own savings and to deal with such property as independent persons. Such property, which legally speaking belonged to the master, was also called *peculium*, and the slave could deal with this and enter into business relations of all kinds for his benefit. As a rule, if a slave entered into a contract with a third party, the promisee was not the slave<sup>2</sup> but the master who could repudiate any transaction not favourable to him, the rule being that the former could acquire rights for his master but not subject him to liabilities.<sup>3</sup>

The Praetor, however, by the end of the Republic allowed the slave in certain circumstances, not only to acquire rights for the master but also to subject him to obligations. This he did mainly by granting actions against the master on transactions concluded by the slave. These actions were called *actiones adieticiae qualitatis* which were of two kinds :

(1) actions based on the idea that a master who had authorised his slave to enter into some business with another must be responsible for it, (2) actions based on the idea that the master who had

<sup>1</sup> A dictionary defines it as "the savings of a son or slave accumulated with the father or master's consent."

<sup>2</sup> A prudent slave could accumulate a sum sufficient to buy his freedom from his master with the help of his *peculium*.

<sup>3</sup> A man's legal rights could be adversely affected by the delicts of his slave for the master was liable either to pay damages or to hand him over to the aggrieved party by way of *noxal* surrender.

allowed a slave to enter into contracts with other persons in respect of his *peculium* must be willing to lose it, if the slave mismanaged the transaction.

PERSONS MID-WAY BETWEEN ABSOLUTE  
FREEDOM AND SLAVERY

I. The slaves manumitted in an informal manner were said to be *in libertate esse*, and they were protected in the enjoyment of their liberty by the magistrates. The *lex Junia Norbana* (A.D. 19) gave to persons so imperfectly manumitted a limited amount of freedom by granting them a restricted *commercium*.

II. There were still others who, though actually free, were still in the position of quasi slaves, e.g.

1. free persons who believed they were slaves ;
2. the *debitor addictus*, who was bound to work for his creditor until the debt was paid ;
3. the *colonii* attached to the soil, though they were personally free, they were slaves of the land. Their property was also called *peculium* and they were considered to be attached to the soil and they could be recovered by an action, even though they ran away. They were the precursors of the villeins of the Middle Ages.
4. Persons in *mancipium* or civil bondage. These were *filiis-familias* sold into slavery by the *paterfamilias* for whom the ceremony of *mancipatio* must be performed. In reality

they were not slaves and hence the purchaser might be sued for any insult or injury to them. They were released from slavery in the same ways as a slave, but neither the *lex Aelia Sentia* nor the *lex Fufia Caninia* applied to them.

5. A free man who agreed to serve as a gladiator.

III. The *statuliber*, a slave granted freedom in a will subject to a suspensive condition, e.g., a man might say in his will "let my slave be free, if he pays my heir 100 *ases*". He was the heir's property until the stipulation was fulfilled. Although he was subject to the ordinary incidence of slavery, he carried with him the right of freedom on the fulfilment of the provision.

#### TERMINATION OF SLAVERY (MANUMISSION)

This may be either by (1) a formal or (2) an informal mode.

In the republican period, there were three formal methods of manumission: (1) by *Censu* when the master had the name of the slave entered on the census as a free man, (2) by *testamento* by which freedom was granted to him by a will, (3) by a formal fictitious suit before a magistrate called *per vindicta*, in which a person<sup>1</sup>, by making the master of a slave defendant in a suit, obtained a decree that the latter was a free person. As regards informal manumission,

<sup>1</sup> He might be a friend of the owner of the slave.

in the later Republic, it could be effected either before friends, or by letter, or at feasts or by inviting the man to dinner. It will be observed that these irregular forms gave to the liberated person only the status of *Latini Juniani*, and not that of a full Roman citizen.

In the Imperial Period, slaves became free :

(1) By *postliminium*. This term is derived from two Latin words (*a*) *post*, across and (*b*) *limen* threshold. It denoted the recovery of rights by a Roman citizen who had became a slave by capture. By a fiction of law, if such a person recovered his freedom, the period during which he was a captive was ignored, and he was considered never to have been in subjection. But if he died in captivity, he was considered to have been dead from the moment he was captured, and all persons in his *potestas* were legally regarded as having attained independence from the time he was taken by the enemy.

(2) By manumission. The procedure for manumission was much simplified. It was enough if the master went with his slave before the praetor, whenever and wherever he met him and declared his intention to set him free, and thereupon he was formally declared free.

(3) By testament. The master might either declare the slave free in his will, in which case he became a freedman of the testator, or he might give directions to the heir to manumit him when the slave became the freedman of the latter.

(4) A new formal method was introduced by an enactment of Constantine (A.D. 316), which was called manumission in the church. The master made a declaration before the bishop in the presence of the congregation that his slave should be free.

(5) In Justinian's time, by appointing a slave as an heir in a testament, the slave became free, even though the master did not expressly confer freedom on him. The result was the same if he adopted him as his son or appointed him tutor to his son by his will.

(6) Certain enactments conferred freedom on the slave, even though he was not manumitted by the owner.

(a) Freedom was given to the slave as a reward for giving information about murder committed by his master. Later enactments extended the reward of freedom for the detection of other crimes also. A slave also became free if his master became a monk.

(b) A slave abandoned by his master owing to disease or infirmity was declared free by an edict of Claudius.

(c) Vespasian enacted that female slaves who were exposed to prostitution should become free.

#### EFFECT OF MANUMISSION

The effect of manumission in the proper form was to make the slave not only free but a Roman citizen. These freedmen were naturally looked down

upon as persons having an inferior status by persons who were free from any taint of slavery in their blood. In ancient Roman society, all free-born persons, called *ingenui*, had the privilege of wearing a gold ring to distinguish them from freedmen who could not wear it unless they were specially permitted by the Emperor.

After manumission the former master retained certain rights over the freedman as patron. They were (1) *Obsequium*, (2) *Operae*, (3) *Bona*.

(1) *Obsequium*. The freedman was obliged to treat his former master with respect, and he could not bring any legal action against him without special permission from a magistrate. Further, if the patron happened to become poor, he was bound to support him and vice versa.

(2) *Operae*. The freedman was usually required to perform certain services for his patron.

(3) *Bona*. By the Law of the Twelve Tables, in case the freedman died intestate and without leaving heirs, his patron succeeded to his estate. In later law, the latter could take a share of the estate only under certain circumstances and in Justinian's time, the freedman need not leave anything to his patron if he had children.

#### RESTRAINTS ON MANUMISSION

In the Republican Period, the power of manumission, being founded on the master's right of

property, was absolutely unlimited. Later, attempts were made to put restrictions on the power of free and unrestricted enfranchisement. In Dr. Lee's words,

"While slaves were few, manumissions were correspondingly infrequent. In the last century of the republic they became alarmingly numerous. In particular, it was cheap and easy to manumit by will, and it may have been some satisfaction to a dying man to think of a crowd of freedmen in new caps of liberty attending his bier. Indiscriminate manumission had a bad effect upon the quality of the citizen body and Augustus sought to restrain it by the legislation to be presently mentioned, which remained on the statute-book until Justinian."

By the *lex Aelia Sentia* (A.D. 4) it was enacted:

(a) that a manumission effected by an insolvent to defraud his creditors was null and void; this statute was applicable to the *peregrini* also;

(b) that a manumission to be valid the owner must be twenty years of age and the slave thirty;

(c) that a master under the age of twenty could only manumit his slaves in the form called *vindicta*, and after good cause shown to the Council specially appointed for the purpose; and that manumission effected by him in any other manner was void.

(d) that slaves under thirty might, in exceptional cases, be given freedom.

The *lex Fufia Caninia* (A.D. 8) laid down that slaves could be manumitted by will, and fixed one hundred as the maximum number who could be enfranchised by a person in this way.

Among other restrictions to manumission, may be mentioned the following :

(1) Originally, manumission could be effected only by persons who owned the slave, that is, *quiritary owners*.<sup>1</sup> As between the *quiritary* and *bonitary* owner, only the former could manumit. By Justinian's time, the difference between the two had vanished, and the rule that a slave could be liberated only by a *quiritary* owner lost all its importance.

(2) A woman under guardianship could not manumit without her tutor's consent.

(3) If a slave was owned by two persons jointly, one person could not give freedom without the consent of the other.

(4) If a person had *usufruct* over another's slave, and if his owner manumitted him, he did not become free but remained only a *servus sine dominus* (*i.e.*, a slave without an owner). The usufructuary also could not free him.

The Emperor Justinian, with the object of encouraging manumission, repealed most of these laws. The *lex Aelia Sentia* was much modified by him. He allowed masters, who had completed the

<sup>1</sup> *Quiritary* ownership was acquired by means of formal methods prescribed by the ancient Civil Law such as *mancipatio*. This is to be distinguished from *bonitary* or equitable ownership, which was developed later by the praetors, who protected the transferee of *res mancipi* delivered without *mancipatio*.

seventeenth year, to confer freedom by testament, and subsequently by one of his *novels* he permitted them to manumit by will, even at the age of fourteen. He, however, enacted that a manumission in fraud of creditors was null and void. Further, he abolished the *lex Fufia Caninia*, (A.D. 8) which put a limit on the enfranchisement of slaves.

## THE LATINI JUNIANI

It will be observed that for *manumission* three conditions had to be fulfilled, *viz.*, (1) the owner should have *quiritary* or full ownership; (2) the manumission must have been properly made in one of the formal modes and (3) the master should be at least thirty years old. If it did not satisfy any of the above conditions, the manumission was defective and technically the slave did not attain freedom, but the praetor protected his personal freedom, though not his property. The *lex Junia Norbana* (about A.D. 29) bestowed on such slaves the rights of Latins, whence they were called *Latini Juniani* and were given limited *commercium*. They might trade with the Romans on the footing of Roman citizens, but could not make a testament, or become heirs, legatees or guardians under a will. They could, however, receive the benefit of *fidei-commissa*. They had no *connubium*, and therefore their children were not under their *potestas*, and consequently, when they died, their whole property went to their original owners and not

to their own heirs, since they could not have any heirs. So, it is said, that "*Latini Juniani* lived like freedmen but died like slaves".

There were various ways by which they could attain full Roman citizenship :

1. by an order of the Emperor ;
2. by holding a magistracy in a Latin colony ;
3. by marrying a Roman or a Latin before seven witnesses, and producing before a magistrate a son a year old, called *anniculus*.
4. by a renewed manumission after fulfilling the requisite conditions ;
5. by rendering military service ;
6. by constructing a ship and carrying wheat in it for six years ;
7. by building an edifice ; or
8. by founding a bakery.

#### THE DEDITICII

The *lex Aelia Sentia* (A.D. 4) enacted that slaves, who had been convicted of some serious crime, or who had been subjected to degrading treatment by their masters for misconduct should on manumission get only the status of *dediticii*, who were, originally, enemies surrendered at discretion. They enjoyed personal liberty, but they could not by any means attain Roman citizenship or even the status of a Latin. They were prohibited from living within a hundred miles of Rome on pain of being permanently sold back

into slavery to one who undertook to keep them beyond that limit. On their death their property was taken by their masters.

• II. HINDU LAW OF SLAVERY

As in Roman Law, so in ancient Hindu Law, slavery was a recognised institution. The main modes by which a person became a slave were (1) capture in war, (2) birth to a slave woman, (3) selling himself as a slave for some sort of consideration, (4) through an order of a court of law. The master was his absolute owner, "familiarly speaking of this species of property in association with cattle under the contemptuous designation of 'bipeds and quadrupeds.'" In the words of Sen, the author of Hindu Jurisprudence, "As regards the conditions of a slave, I think the provisions of the Hindu Law bearing upon it were on the whole much more humane than under the Roman Law<sup>1</sup>. . . . Turning to the Hindu Law we do not find any trace of the master having the power of life and death over his slaves; on the other hand Manu distinctly laid down that the master's authority to mete out even moderate chastisement was subject to limitations in the same way as the father's power to chastise his son, and any violation of these limitations was punishable by the king. As regards rights of property, a slave, no doubt, could not

<sup>1</sup> Sen's reference to Roman Law is mainly to the condition of slaves during the Republican period. By Justinian's time, it will be observed, they were much better off.

acquire any property for himself during his subjection to slavery, but his former property did not pass to his master and he could buy his emancipation through the same." Ordinarily, slavery was terminated on the fulfilment of certain conditions, unless it arose from birth or where the slave was obtained by purchase, gift, or by way of succession from the previous owner, or where he had sold himself as a slave for a price. Subject to these rules, the master's right to emancipate a slave was unconfined, unlike Roman Law during the Imperial period prior to Justinian. Here it may be remarked that slavery was abolished in India in A.D. 1843.

### III. MUSLIM LAW OF SLAVERY

In Muslim Law also slavery is recognised. It recognises only two modes by which a man became a slave.

(1) By capture in war, but only where the captives were non-Muslims.

(2) By birth to unbelievers made slaves.

The nature of slavery in Muslim as well as in Hindu Law is not unlike Roman Law, in that the slave is regarded essentially as a thing, and he is a subject of inheritance and contracts in the same manner as other property. Hence a slave could not own any property. At the same time in certain matters, he is treated as a person capable of rights and duties. For example, the slave is permitted to marry and divorce with the consent of his master. In

Abdur Rahim's<sup>1</sup> words, "a slave's right in matters of marriage and divorce is one half of that of a free man. What is meant is that a male slave is restricted to two wives instead of four, and a slave wife will be irrevocably divorced on pronouncement of two taluks instead of three, one and a half being increased to two in order to avoid a fraction. On the same ground a slave wife's period of probation or *iddat* consists of two courses". According to the Hanafi Law, a slave is legally entitled to the protection of his person and, if a man kills or causes hurt to the latter, he makes himself liable to punishment. And if he commits a crime, he incurs the penalty of the law, but in meting out punishment to him the law prescribes only half the sentence of that of a free man, if the punishment is capable of division as, for instance, the number of stripes in his case is half the number inflicted on a free person for the offence of prostitution. Further, he is not eligible to hold any office either public or private such as guardian, *muthawalli*, or *Kazi*, neither could he be a competent witness in a court of law. He, however, could regain his freedom by manumission given by his master and Muslim Law has always encouraged it.

#### IV. ENGLISH LAW OF SLAVERY

In Anglo-Saxon times and during the period of the Norman Kings, slavery was recognised in England. To quote Buckland and MacNair,

<sup>1</sup> The author of *Mohammedan Jurisprudence*.

"Bracton, 'identifying the *servus* with the *villanus*', was disposed to import a considerable amount of the Roman Law of slavery. But there seem to be two reasons why the history of slavery in the two systems has been so different; firstly, with us, villeinage remained a predial, an agricultural condition, . . . ; and, secondly, the strong leaning in favour of liberty which has marked the common law from very early times, by encouraging presumptions of manumission and other pleas which would defeat villein status, ultimately succeeded in so completely undermining that status that, as Professor Holdsworth says, 'the law of villein status was never repealed. It simply fell into disuse because the persons to whom it applied had ceased to exist'. When at a later stage the common law was faced with the problem of colonial slavery, this same bias, receiving fresh stimulus from Puritanism and the Revolution, eventually enabled Sir John Holt and Lord Mansfield to hold that the moment a negro slave stepped upon English ground he became free."

#### V. ROMAN LAW OF FAMILY (PATRIA POTESTAS) THE ROMAN FAMILY

Ancient Roman Law, which concerned itself mainly with the family as a unit, was designed for a

social order different from the modern. The latter consists of individuals, and the law exists for the purpose of regulating the rights and obligations of these individuals towards one another. The unit of society in Rome, at the beginning of its legal history, was not the individual but the family. The individual had no legal rights at all ; all the rights which the law recognised concerned only the family, and could be exercised only by the head of the family. The Roman family was very different from the modern European family ; it was more like a joint Hindu family. It may be described as an agnatic patriarchal family. It consisted of all the descendants in the direct male line of a living common ancestor who was the head of the family and was known as the *paterfamilias*. The unlimited authority which he exercised over his descendants, the *filiifamiliae*, was called *patria potestas*. A *filiusfamilias* had no rights of any description ; any property acquired by him passed to his *paterfamilias* ; his liberty and life were at the disposal of the latter. The family, of which the *paterfamilias* was despotic ruler, was limited only to his agnatic descendants. A daughter was a member of her father's family, only so long as she was unmarried. On marriage she passed into the *potestas* of her husband's *paterfamilias*, and her children belonged to her husband's family. Cognatic relations<sup>1</sup> were therefore

<sup>1</sup> Cognates are all blood relations. Agnates on the other hand are those who can trace their descent from a male ancestor in the male line in an unbroken line of male descent. For example, one's sister's son is a cognate, while a son's son or a father's father is an agnate.

not included in a Roman family. The death of the head of the family naturally split it up and when it happened, each of his sons, who till then was under his control, became in his turn the head of a family consisting of his agnatic relations. This natural course might be varied in two ways : firstly, a *filius-familias* might cease to be a member of the family and go out of it. Secondly, one not born in it might be brought into it by adoption. A person adopted into the family was given exactly the same status as one born in it. He became an agnate of the other members in it. Whether agnatic relationship existed between two persons came to be determined in course of time by their common obedience to the same *paterfamilias*. In other words, "two people are related agnatically if they are in the *patria potestas* of the same man, or if there is some common ancestor in whose power they would both be if he were alive".

#### WOMAN AND PATRIA POTESTAS

In speaking about a Roman family, the following points may be noted (1) If, for example, X was the head of a family and he had a son Y and a daughter B, Y and B were in the *potestas* of X, but his daughter's children were not in his *potestas*. As soon as she was married, she passed into the *potestas* of her husband or his *paterfamilias* as the case might be. (2) In case X died leaving a son and a daughter, the former at once became the head of a family of his own and acquired

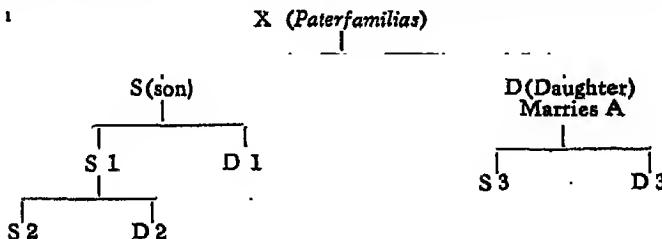
*patria potestas* over his children and his son's children. The daughter B on the other hand did not become the head of a family even though she had children of her own. A woman, could never become the head of a family and, therefore, could never exercise *patria potestas*.

#### WOMAN IS THE END OF THE FAMILY

As will be seen from the illustration given below<sup>1</sup>, so far as X is concerned, D, the daughter, is the end of his family, and the moment she is married, she passes on to another family altogether. In other words, a daughter on her marriage went from her father's family to that of her husband and she was said to be *in manum* to him. For the purpose of *patria potestas*, she was regarded, curiously enough, not as a wife but as a daughter to her husband. Hence the expression *manus* (which signified the authority the husband had over his wife) was originally synonymous with *patria potestas*.

##### (1) PATRIA POTESTAS OVER PERSON

The junior members in a Roman family were all entirely under the control of the *paterfamilias* who



had unlimited powers over them. He had the power of life and death over his descendants who were in this respect no better than slaves. He could sell his *filiusfamilias*, corporally chastise him, or kill him, the only restraint over his unlimited powers being custom and public opinion. Further, the *filiusfamilias* could not marry without his consent, and he could even dissolve the marriage without so much as taking the consent of the husband. In the words of a learned writer,

"Originally and for a long time the *patria potestas* had a terribly despotic character. . . . Consider now that the *patria potestas* had this character and extent down to the Christian era: that, in general, every citizen of the republic who had a living father was in this condition, unable to hold property, unable to acquire anything for himself, wholly dependent on his father in property and person, liable to be chastised, to be sold into a kind of slavery, to be put to death without help or vindication from the law. It was no uncommon thing for men to have passed through every grade in the public service, to have been tribunes and praetors and consuls, to have reached an honoured old age, without ever having owned or been able to own a penny-worth of property. It must doubtless have happened at times that the son as *imperator* in war exercised command over a

father on whom he was absolutely dependent for his daily sustenance. It is remarkable that the son's position as a citizen was not in the least affected by his subjection to this despotic control: in all his relations to the state, in all his political rights and powers, the *filiusfamilias* stood on the same footing with the *paterfamilias*. The legal relation between them was one of private, and not of public law.

" You may naturally inquire, how it was possible for the Romans, with their practical sense and their strong feeling for equity, to invest the *paterfamilias* with such extensive and dangerous powers. There can be little doubt, I think, as to the answer. The reason which caused the Romans to accept and uphold the *patria potestas*, to maintain it with singular tenacity against the influence of other systems with which they came in contact, must have been the profound impression of family unity, the conviction that every family was, and of right ought to be, one body, with one will and one executive. . . . It was precisely the sound sense of the Romans and their feeling of equity that sustained the *patria potestas*; because they furnished the best guarantee that the *potestas* would be sensibly and equitably used. If it had been generally abused, it must have been

soon discarded. As for an occasional abuse, the Romans doubtless thought it better to endure such than to incur the risk of disturbing what they regarded as the natural and normal relations of the family."

During the Imperial period, attempts were made to improve the lot of the *filiusfamilias* by reducing the father's powers within reasonable limits. Trajan restrained the ill-treatment of children by making the father emancipate his son on whom he had inflicted cruel treatment. Hadrian enacted that, if a person killed his son, he should be deported to an island. Alexander Severus limited the power of the father to simple chastisement. Diocletian and Maximian forbade children to be sold, pledged, or given away by their parent. But the Emperor Constantine permitted the sale of children immediately after birth, in cases of extreme poverty, reserving the right to redeem them on repayment of the price. He also enacted in A.D. 318 that the man who killed his son should be guilty of murder and suffer the death of a parricide, "that is, be tied up in a sack with a viper, a cock, and an ape, and be thrown into water and drowned". Valentinian forbade the exposure of children.

By Justinian's time *patria potestas* had been shorn of many of the privileges which it had during the earlier periods, and was limited to the power of moderate chastisement. The domestic tribunal, with powers of life and death vested in the *paterfamilias*

as the head of the family, had disappeared completely. The powers of killing, selling, pledging, were all gone ; that right to sell children into bondage or *mancipium* was also taken away. Justinian, however, retained in its entirety the provision of Constantine permitting parents to sell their children, including the provision as to redemption. *Noxal* surrender was formally abolished by him. He also increased the penalties against a creditor who took possession of a freeborn child of a debtor as security for his debt by enacting that he should not only forfeit the debt but also pay an equal sum to the child or parent, and undergo corporal punishment. The father, however, still continued to retain the powers of nominating guardians by testament, of giving a *filiusfamilias* in adoption, of pupillary substitution, and in certain cases of withholding his consent to the marriage of his child.

#### (2) PATRIA POTESTAS OVER PROPERTY

Originally, the *filiusfamilias* could not own any property on his own account, no matter how small in value. Whatever he earned belonged to the head of the family. He could not enter into any contract, and even if he did, the rights arising out of it would vest with the head of the family and not with the junior member, though he was the actual party to it. He was always at liberty to repudiate the agreement, if it was not advantageous to him. In the words of Prof. Jolowicz,

"So far as proprietary relationships are concerned, the old rule that all acquisitions go to the father also remained untouched, though it became common for sons, like slaves, to have *peculia*. These would be all the more necessary as civilisation became more urban and the son no longer usually worked with his father on the land. In the plays of Plautus they appear already as a well-recognised institution, so that they were certainly not new at that time. Action against the father on the son's contract could be brought in the same cases as against the master on the contract of his slave."

In other words the position of the son in this respect was the same as that of a slave. Like the latter he could have *peculium* entrusted to him by his father for certain specified purposes, e.g., for carrying on a trade. This was called *peculium profectitum*.

During the Imperial period, owing to the enactments of the emperors, the son acquired the right to own property on his own account independently of his father. Augustus enacted that he could keep as his separate property whatever he acquired as a soldier in military service. The property thus acquired was called *peculium castrense*<sup>1</sup>. Again, in Constantine's time, there was the *peculium quasi castrense*, consisting of property earned by a person in the civil service of

<sup>1</sup> *peculium*—money. *castrense*—that which was acquired in a military camp.

the state and liberal professions. In respect of both these *peculia* the son was the absolute owner, and had full power to dispose of them just as he liked, i. e., either *inter vivos* or by will, subject to the rule that in *peculium quasi castrense*, the power of bequeathing was not allowed, except in certain cases.

There was another kind of *peculium* called *peculium adventitium*<sup>1</sup> which was first recognised by the emperor Constantine, who enacted that what a *filiusfamilias* inherited from his mother belonged to him and that it should not be merged in his father's estate, though the father was allowed to have usufruct over it during his lifetime with no power of alienation. Subsequent Emperors extended this kind of *peculium* to all kinds of property inherited by a person or received as gifts *inter vivos* from maternal ascendants. The son did not possess absolute powers of disposal over it as he had over *peculium castrense* and *quasi castrense*. He could not dispose of it by will, and on his death it went to his father. Constantine decreed that, if the son was emancipated, he should get two thirds of this property, the father keeping one-third for himself as owner.

Justinian made further inroads upon the power of the *paterfamilias* by increasing the rights of the children under power. He allowed *peculium quasi castrense* to be disposed of by will. On the death of the son intestate, the *peculium castrense* reverted to

<sup>1</sup> *Adventitium*—not inherited or not originally ones own.

the father as owner, the father's powers over such *peculium* were considered as having been merely suspended during the life-time of the son. But Justinian took away this prerogative and enacted that all the son's belongings, except *peculium profectitium*, should be regarded as his absolute property and he further ordained that only if the son happened to die intestate the property should pass to his father. Thus, the latter would get the son's property, only as an heir on intestacy. But in that case his claim was postponed to that of certain other nearer relations of the son. As regards *peculium adventitium* he extended this term to include all *peculium* other than *peculium castrense*, *peculium quasi castrense*, and *peculium profectitium*. We have already noticed that the son was the owner of *peculium adventitium*, while the father had an usufruct over it during his life time. This was also the law in Justinian's time. But, formerly, if the father chose to emancipate his son, he retained a third of it as owner. Justinian changed this rule and gave the father only an usufruct over half of it instead of ownership over a third. There was no change regarding *peculium profectitium* and it could be resumed by the father at will. There were thus in Justinian's time three kinds of rights over property viz., (1) those over which the *filiusfamilias* had absolute control, viz., *peculium castrense* and *peculium quasi-castrense*, (2) those of which the father had the usufruct while the *filius-familias* was the owner, viz., *peculium adventitium*, and (3) those of which the *filiusfamilias* had

only the use and enjoyment, while his father retained the ownership, *viz.*, *peculium profectitium*.

#### CREATION OF PATRIA POTESTAS

*Patria potestas* was acquired in the following ways:

- (1) Adoption.
- (2) Birth.
- (3) Legitimation.

In the Republican period, there were only two ways of creating *patria potestas*, namely, (1) Adoption and (2) Marriage.

#### ADOPTION

Adoption occupies an intermediate place in the history of law. It comes between ancient law which recognised nothing but intestate succession, and the later law which possessed in the will a much better instrument to settle the devolution of one's property.

The objects of adoption are two-fold (1) Religious and (2) Secular.

(1) Religious. In Roman Law, as in Hindu Law, the primary object is to secure spiritual benefit to the adoptive father and his ancestors by having a son who would perform religious rites to propitiate the manes of the dead.

(2) Secular. In this, the object is to secure some one to succeed to the property of the adopter so as to

perpetuate a family which is about to be extinguished for want of heirs.

In Prof. Muirhead's words

"A Roman family was an association hallowed by religion, and held together not by might merely but by conjugal affection, parental piety, and filial reverence. The purpose of marriage was to rear sons who might perpetuate the house and the family *sacra*. . . . The husband was priest in the family, but wife and children alike assisted in its prayers, and took part in the sacrifices to its *lares* and *penates*."

The importance attached to the religious basis in a Roman family—especially the *sacra*—is responsible for two institutions<sup>1</sup> in Roman Law, the object of both of which is the continuance of the family and its religious cult.

There are two kinds of adoption :

- (1) *Adrogation* or *arrogation*.
- (2) Adoption proper.

#### (1) ADROGATION<sup>2</sup>

Firstly, there must be the *adrogator*, i.e., the person who is capable of taking in *adrogation*; and the *adrogatus*,—one who is capable of being taken in

<sup>1</sup> i.e., marriage and adoption.

<sup>2</sup> From *ad*, to and *rogo*, I ask. *Adrogation* is a kind of adoption where the consent of the parties is obtained by questioning.

*adrogation.* Thus two persons were required for every *adrogation.*

Secondly, both of them must be *sui juris.* In other words, neither of these persons must be subordinate to the *patria potestas* of any one else.

Thirdly, it could take place only with the approval of the popular assembly, the *comitia curiata* which was known as the *comitia calata* when it met for this purpose. The matter was referred to the College of *Pontifices*, the early custodians of law and religion. Being a matter connected with the extinction of a Roman family and with it its religious *sacra*,<sup>1</sup> it was of public importance for the *adrogatus* might himself be the head of a family. By *adrogation* he passed into the family of the *adrogator* along with the junior members of his family. It meant virtually the extinction of his family, and further all his estate was taken by the *adrogator*. Hence the college of *Pontifices* considered on grounds of public policy whether it was expedient to allow the extinction of the family. If it approved of it, both the parties had to appear before the *comitia curiata*, when each was questioned as to his willingness (*a*) to take and (*b*) to be taken in *adrogation*. The *comitia* was also asked whether it sanctioned the act.

Fourthly, neither a woman nor a minor could be *adrogated*, because the latter could not validly give his consent, and the former could not, for she could not appear before the assembly.

<sup>1</sup> The private religious rites, of a family.

Fifthly, in *adrogation* and adoption the person adopting might be born impotent, but the impotency must not be the result of his voluntary act. The theory was that in the former case he might regain potency in his life-time but in the latter he could not. But it was immaterial whether he was married or unmarried.

Sixthly, *adrogation*<sup>1</sup> could be made only in Rome as the consent of the *comitia calata* was required.

During the early Imperial period, the *comitia curiata*, whose approval was necessary for an *adrogation*, fell into decay and came to be represented by thirty *lictors* who could give the required sanction. Further, the Emperor Antoninus Pius (A.D. 138—161) allowed the *adrogation* of persons under age provided they were *sui juris*. He

“allowed the *adrogation* of *impubes* (*sui juris*) under conditions of great strictness intended to protect these young boys from dishonest *adrogation* aimed at depriving them of their property. The principal conditions were : (a) that the *adrogation* was honourable and advantageous to the *impubes*; (b) that if

<sup>1</sup> This is one of the points of difference between *adrogation* and adoption. Among others may be mentioned :

- (a) The effect of adoption is to transfer a person from one family into another. Whereas in *adrogation* the transfer is not one person alone but several.
- (b) In adoption the adopted person, being dependent or *alieni juris*, had no property of his own. The adoptive father may not gain any material advantage out of the transaction, while in *adrogation*, the adopted person being *sui juris*, all his property passed into the *advocator's* hands.

he died before puberty, his property should go to his natural heirs; (c) that if emancipated or disinherited before puberty all his property should be restored to him, together with (if there were no good reason for the emancipation or disinherison) a fourth (Quarta Antonina) of the *adrogator's* goods on the death of the latter; (d) that if the *adrogatus*, on attaining puberty, could show the *adrogation* was unfavourable, he could claim his property and emancipation."

As regards *adrogation* of women, this was not possible originally, as a woman could not appear before the *comitia calata*. This disability was removed by the Emperor Diocletian who allowed *adrogation* to be made by an Imperial *rescript*. From that time, it could take place anywhere in the Empire, and not necessarily as before at Rome alone, as was the case when it had to be sanctioned by the Assembly. Again, he made it a rule that the *adrogator* must at least be sixty years old and childless and only where he was at least eighteen years older than the *adrogatus*. At the time of Justinian; however, the former acquired only an *usufruct* for life over the property of the latter.

#### (2) ADOPTION PROPER

Before Justinian, adoption was effected by two formal methods called (1) *Mancipatio*, and (2) *In Jure Cessio*.

To enable the adopter to acquire *potestas* over another it was essential that the natural father's *patria potestas* should be destroyed. This was effected by *mancipatio*. The natural father sold his son three times in the presence of five Roman citizens of adult age and another called the *libripens*. After the third sale the natural father's power was destroyed in accordance with a rule in the Twelve Tables. The son was then in *mancipio* to the purchaser who was usually the adopter. The latter re-mancipated him to the natural father and claimed him as his son by another process called *in jure cessio*, which consisted of a fictitious suit before a Roman Magistrate, who thereupon declared that the child was the son of the plaintiff.

The characteristic features of an adoption are :

(1) The person adopted should be *alieni juris*. Thus, three persons are required for every adoption. (a) the adoptive father, (b) the person to be adopted and (c) the natural father.

(2) A bachelor or married person could adopt, provided he had the *jus connubium*, but a woman could not, because the effect of adoption is to create *patria potestas*, and as a woman had no *potestas* even over her own natural children, she could not have it over her adopted children.

(3) Although women could not adopt, they could be validly adopted.

(4) A person could not only adopt a son or daughter, but he could also adopt a grandson or grand-daughter even though he had no son. This may

be taken as one of the exceptions to the rule that adoption follows nature.

(5) An adoptive father could not adopt a grandson on behalf of his son, while the son was living, without the son's consent. That would have meant forcing into the family of a junior member a person who was not wanted. But, on the other hand, a *paterfamilias* could give a grandson in adoption to another without the son's consent.

In the Imperial Period, any defect in an adoption made by *mancipatio* might be remedied by the Emperor, as *mancipatio* was now considered as merely an empty form. Further, it became the rule that adoption could be effected by an order of the magistrate (*imperio magistratus*). During the Republic, women could not adopt as they had no *patria potestas*. But in A.D. 291, Diocletian enabled women to adopt as a consolation for the loss of their children. But, so far as the disability to acquire *potestas* was concerned, their position remained the same as before.

In adoption as well as in adrogation the person adopted must be younger than the adopter. This came to be the rule from the time of the jurist Modestinus. For one of the maxims of Roman Law is "*adoptio naturam imitatur*" i.e., adoption follows nature. There must be at least a difference of eighteen years between the two.

During Justinian's reign, adoption was effected by a formal deed drawn up before a superior Roman

magistrate and followed by registration in Court. The adoptive father, person to be adopted, and the natural father were required to be present before the magistrate to give their consent to the adoption.

Further, Justinian made some important changes in this branch of law. Ordinarily the effect of adoption was to transfer the adopted person from his natural family to that of the adopter. It meant the breaking up of the old agnatic tie which he had to his natural family, resulting in the severance of all family rights. By adoption he became a member of the adoptive family. In other words, adoption created the relation of father and son for all practical purposes. An adopted person left his own family, entered the family of his adopter, came under his *patria potestas* and acquired the capacity to inherit from him. But public dignities were not changed by adoption; so that if a plebeian adopted a senator, the adoption did not affect the latter's status.

This practice led in some cases to severe hardship. If, after adoption, the adopted person was emancipated by a capricious act of the adopter, his position was quite an unenviable one, for he lost his rights in both his natural and adopted families. To remedy this defect Justinian decreed that:

(1) If a person were adopted by a stranger, the effect would not be to sever his ties of agnation with his natural family. The adopter did not acquire *patria potestas* over him, but he enacted that the adopted son might succeed to the adopter, if the

latter died intestate. This is called *adoptio minus plena*<sup>1</sup>.

(2) In the case of adoption by a near relative, as for example, a natural ancestor like a great-grandfather (paternal or maternal), the result was under the old law, i.e., the child passed under the *potestas* of the adoptive father. It was thought that a person like a grandfather, owing to the affection arising from the ties of blood, would not emancipate the adopted person, and deprive him of the rights of succession. This is called *adoptio plena* or complete adoption.

#### VI. HINDU LAW OF FAMILY

The Hindu joint family has many points of contact with the Roman. To begin with, in Hindu Society, as among the Romans, lineage is traced from a common male ancestor in an unbroken line of male descent. The members of the family usually live a joint life under the same roof and under the control of the *kartha* (manager) who resembles to some extent the *paterfamilias* of Roman Law. "The normal condition of Hindu family is jointness, not only in estate (property), but also in food and worship. . . . A Hindu family ordinarily consists of all the descendants in the male line from a common ancestor, their wives and unmarried daughters."

The powers of a Hindu father over the junior members of the family, at the present day, are very

<sup>1</sup> *Adoptio*—adoption,  
*minus*—less,  
*plena*—complete. } i.e., an incomplete adoption.

limited when compared to the powers which a Roman father had even in Justinian's time. As regards his rights over the junior members, the power of the father over his children does not extend beyond moderate corporal chastisement and this right does not extend beyond their minority as is the case in Roman Law. He is the natural guardian of all the minors in the family, and he can give a daughter in marriage or a son in adoption. As to his powers over the ancestral property belonging to the joint family, his position is something like that of a trustee, with this difference that, unlike him, he has certain extra-ordinary powers of alienation and distribution and he is not liable to account for his past dealings with the family property. In ancient Roman Law on the other hand no distinction was made between ancestral or self-acquired property, in respect of both of which the father had absolute dominion and power of disposition, at any rate during the Republican period.

As in Roman Law, one of the most important rights which a father has over his children is the right to give his son in adoption. In both the systems the object of adoption is primarily religious. In the words of Houston, "Lest those to whom Providence has denied the blessing of an *Aurasa*, or son-of-the-body, should forfeit all the attendant spiritual advantages for themselves and their ancestors, the law mercifully allows them to procure a substitute for such *Aurasa* by adoption."

For every act of adoption three persons are required as in Roman Law, namely, the natural father, the adoptive father, and the person adopted. On adoption the boy becomes, legally speaking, part and parcel of the adoptive family. Amongst the higher castes, the adopted person should be of a tender age, but among the Sudras he may be of any age, provided he is unmarried. "The object of adoption being to supply the place of issue capable of offering funeral oblations, no one already possessed of such is competent to adopt; nor, having once provided themselves in the latter mode, can they take a second adoptive son during the life time of the first". Generally speaking, a female, as in Roman Law, cannot adopt, but a married woman may with the consent of her husband adopt a son to him. The formalities of adoption will depend on the kind of adoption, as for instance, whether it is *dattaka* or *kritrima*. In the former, the ceremonies usually consist of, first, a solemn declaration on the part of the adoptive parent of an intention to establish the parental relation between himself and the boy, following the consent of the boy's parents or natural guardians; secondly, the offering of certain oblations, the pouring of water, etc., together with the performance of tonsure and investiture in the adoptive family, if the boy belongs to a privileged class.

#### VII. MUSLIM LAW OF FAMILY

The Muslim family, like the Roman and Hindu, is a patriarchal one where descent is traced from a

common male ancestor. Here the similarity ends. There is nothing in Muslim Law corresponding to the joint family of the ancient Romans or Hindus with the *paterfamilias* or *kartha* as the head of the family, exercising powers over the children and grand children. In Muslim Law the children become *sui juris* on their attaining age and the father, generally speaking, has no power either over their person or their property on their attaining majority. While they are *alieni juris*, the father has only moderate powers of chastisement over the person and, as regards his property, his position is something like a trustee. Further, unlike Roman Law and Hindu Law, in Muslim Law adoption is not recognised.

#### VIII. ENGLISH LAW OF FAMILY

The English Law of family is quite different from the Roman. In the words of Buckland and MacNair,

“ This immense power of the *paterfamilias*, coupled with his right to determine the relation at any time, makes the Roman family a very different thing from ours. In our Law the father has control of the legitimate child, custody and so forth, with an obligation of maintenance; these rights, and, apparently, the obligations, determining at latest when the child is of full age and in some circumstances earlier; the mother's rights are

similar when those of the father come to an end by death or otherwise, and since 1925 father and mother are in many respects upon an equality in regard to their guardianship of their legitimate infant children ; of illegitimate children it is the mother who has the primary right of custody. . . . The child's property is his own : anything given to him by the parent or from outside vests in him, though his powers of administration are very limited in infancy."

It may also be stated here that an English parent has only reasonable powers of corporal punishment on his children, and that too only during their minority.

The English Common Law, until recently, did not recognise adoption. But by a statute passed in 1926 adoption is recognised in England, but the law on this subject is quite different from the Roman Law. The only point of resemblance between the two systems is that in both the principle "*adoptio naturam imitatur*" is recognised. Further, in English Law as in the Roman, adoption could take place only with the approval of the State in Rome, and the Court in England, and again in both the systems the consent of the persons interested is required. But in all other respects the two systems differ. In fact, in English Law, it may be said to be a special kind of guardianship which is terminated when the child is twenty-one.

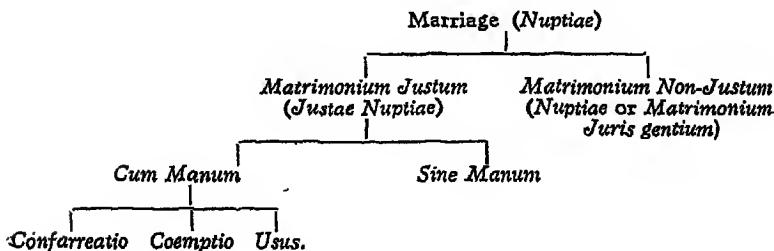
## IX. ROMAN LAW OF MARRIAGE

The second mode of acquiring *Patria Potestas* was by marriage. Marriage in Roman Law is essentially a contract as in Muslim and English Law. Since marriage is contracted by agreement, it could also be dissolved by agreement, subject, however, to such rules as might be imposed on the severance of the marriage relation on grounds of public policy. Therefore, in Roman, Muslim, and English Law, provision is made for divorce; whereas in Hindu Law, where marriage is regarded as a sacrament, no provision is made for divorce, because the Hindu jurists regarded marriage as a sacred institution indissoluble even by the death of either the husband or wife.

*MATRIMONIUM JUSTUM AND NON JUSTUM*<sup>1</sup>

At the time of the Twelve Tables there were two kinds of marriages known to Roman Law: (A) *Matrimonium Justum* and (B) *Matrimonium non justum*. In Lord Mackenzie's words:

"The first occurred when both parties had the capacity to enter into a lawful marriage, carrying along with it the paternal power,



and other civil rights ; and originally this was strictly confined to Roman citizens, or those to whom the *jus connubium* was conceded. The *matrimonium non justum*, on the other hand, in which *connubium* was wanting, as in the case of marriage between *Latini*, or foreigners, or between Romans and foreigners, though an equally valid and binding marriage, did not confer the *patria potestas*, and other important civil rights."

The marriage *cum manum* was in general use at the time of the Twelve Tables. *Manus* arose in one of the three following ways :

- (1) *Confarreatio*<sup>1</sup>
- (2) *Coemptio,*
- (3) *Usus.*

There are a few principles common to these three forms of marriage.

(1) The effect of marriage in any one of these forms resulted in conferring *manus* on the husband over the wife, if he were *sui juris*, and if *alieni juris*, it vested in the *paterfamilias* of the husband. Consequently, the wife left her agnatic family, and suffered change of status called *capitis deminutio minima*. Further, the husband or his *paterfamilias* acquired *potestas* not only over the wife but also over children born of the marriage.

(2) She also transferred to her husband's family all the property of which she was the exclusive owner

<sup>1</sup> From *farreus*—the cake of sacrifice.

with the result that the husband or his *paterfamilias* became its owner. Not only that, whatever the wife acquired during marriage was taken by the person under whose *potestas* she was.

(3) For obligations created by the woman before marriage, neither the woman, nor her husband, nor his *paterfamilias* were liable, but later the *Praetors* allowed judgement to be executed against the property of the woman in the hands of the husband or the *paterfamilias*.

(4) In these three forms of marriage it is necessary that the spouses should possess the *jus connubium*<sup>1</sup> which meant the right to marry as Roman citizens. Originally (a) aliens, (b) citizens of a Latin colony, (c) slaves or freedmen, and until the passing of the *Lex Canuleia* (B.C. 445), (d) the plebians, could not marry so as to acquire *manus* over the wife.

(5) The parties must be legally competent to marry. For example, the following could not marry at all (a) persons already married, (b) castrate, (c) guardians and their wards, (d) persons too nearly related to each other. Certain restrictions relating to consanguinity and affinity had to be observed. Affinity arises where a relationship is created by marriage. For instance, if A (a male) married B, A could not marry B's mother, that is, his mother-in-law. Consanguinity on the other hand arises by blood relationship. It is a rule common to Roman Law and to

<sup>1</sup>This and the following three rules were applicable equally to *matrimonium cum manum* and *matrimonium sine manum*.

all civilized systems of Law, that a man or woman could not marry an ancestor or descendant. These rules also have been extended to the law of adoption. A man could not, for instance, marry his adopted daughter even though she has been emancipated by him.

(6) It is essential that the parties to the marriage should consent, if *sui juris*, and if *alieni juris*, they ought to get the consent of their respective *patres-familias*.

(7) On the ground of public policy, marriage between a Senator and an actress, or a guardian and his ward, was prohibited.

(8) The parties to a marriage must have attained puberty.<sup>1</sup>

The effect of not complying with any one of the above provisions was to make the marriage void. Consequently, the husband did not acquire *manus* over the wife. In some cases, especially where the rule as to affinity or consanguinity was violated, the parties were liable to be criminally prosecuted for incest.

#### CONFARREATIO<sup>2</sup>

It consisted primarily of a solemn religious ceremony before ten witnesses and originally it was

<sup>1</sup> The age of puberty in early Roman Law was a question of fact depending on physical conditions. In later law, this was fixed at 14 for males and 12 for females.

<sup>2</sup> *Confarreatio* may be roughly compared to the *Brahma* form of marriage in Hindu Law. Originally, this form was peculiar to the Brahmins. Now, both Brahmins and Sudras may resort to it. According to this a girl is given in marriage by her father without receiving any consideration from the bridegroom.

available only to *patricians*. Only those could take part in the ceremony who had the *jus sacrum*<sup>1</sup> and only those persons whose parents were married by *confarreatio* were eligible for the higher priestly offices. "It took its name from the cake of spelt, (*far*) which was offered to Jupiter Farreus and which was divided by the priest between the bride and bridegroom as a token of a life in common."

#### COEMPTIO

The second form of marriage which created *manus* was *Coemptio*<sup>2</sup>. It was based on the fiction of a *mancipatio*. The husband was supposed to have purchased the wife. It was the ordinary form by which any Roman citizens might marry whether a patrician or a plebeian.

#### USUS

Thirdly, there was *usus* which was the simplest form of all. It consisted merely in the woman living with her husband for an uninterrupted period of one year. Just as a person might acquire ownership of moveable property by prescription, i.e., an uninterrupted possession of a thing for one year, so the Roman Jurists considered that a man could get the full

<sup>1</sup> The private religious rite of a clan, a family, etc.

<sup>2</sup> It is something like the *Asura* form of marriage in Hindu Law. In this form it is a sale of the bride by her father for a pecuniary consideration which is called *Sulka* or bride's price.

rights of a husband over a woman, if she were to live with him continuously for a period of one year. This rule was the outcome of the ancient view which considered the daughter as a mere chattel belonging to her father. *Usus* was fully recognised and was frequently resorted to even during the time of the Twelve Tables. In the words of Prof. Declareuil (of the University of Toulouse) :

"*Coemptio* and *usus* carry us back to more ancient customs of humanity. Purchase and abduction were at first the simplest means of acquiring wives. *Coemptio* was purchase of the woman by way of *mancipatio*, an ancient type of sale. The father, who had the right to make profit out of his children, sold his daughter to whoever had need of her in order to procure descendants, and in course of time the purchase became symbolical : one no longer bought the woman, but the power over her, which amounted to the same thing. *Usus* was akin to the ancient practice of abduction by force, now adapted to suit a more civilized society in which possession was not transformed into rightful ownership until after the lapse of a certain period."

#### MATRIMONIUM SINE MANUM

*Matrimonium sine manum* also resulted in an equally valid and binding marriage, but it did not

confer *manus* on the husband. This form of marriage, which was destined to supersede all the other three forms, was derived, by a clever interpretation made by the Roman jurists, from a rule as to *usus* in the XII Tables. The rule in *usus* was that a wife should live with her husband for an uninterrupted period of one year. But, if she lived away from her husband for a few days in a year continuously, say for three or more nights<sup>1</sup>, the result was that the marriage was valid, but it did not confer *manus* on the husband. Before the end of the Republic, the *matrimonium cum manum* had nearly disappeared and by the time of the early Emperors *manus* was looked upon as a "mere antiquarian curiosity". The effect of *matrimonium sine manum* was that the wife continued to be in the *potestas* of her father, if *alieni juris*, and if *sui juris*, under the *auctoritas* of her tutor but free from the *manus* of her husband. But the children of the marriage were under their father's *potestas* and possessed rights of inheritance from him, provided their parents had the *jus connubium*. As between husband and wife there were no mutual legal obligations. In the absence of a contract to the contrary, the husband was not bound to maintain his wife and he had no rights to the wife's property. Besides, in *matrimonium sine manum*, the wife was known merely as *uxor*, while under *matrimonium cum manum*, she was called *mater-familias*.

<sup>1</sup> *trinotiv absentia*—absence for three nights.

## MARRIAGE IN THE IMPERIAL PERIOD

Among the three modes of creating *manus, usus*, was the first to disappear, and at the time of Gaius it was non-existent. *Confarreatio* also had become rare, and as the priestly offices were only open to the issue of such marriage, it was difficult to find qualified people for such offices. Tiberius, therefore, laid down that one who married a *flamen dialis*<sup>1</sup> should pass into *manus* only for certain specified purposes, and as to others they should be free from *manus*. We do not hear of *confarreatio* after the jurist Ulpian. *Coemptio* gradually disappeared soon after the time of Gaius.

In this period, marriage was forbidden between members of certain ranks or orders of society by positive laws. By the *lex Julia Adulteris* (B.C. 18), it was forbidden between senators and freed women. Members of the senatorial rank were also forbidden to marry actresses and some others without the Emperor's leave. The Christian Emperors prohibited marriage between Christians and Jews. Again, on the ground of official relationship, it was forbidden between a provincial governor and any of his subjects while he held office; neither could a high provincial magistrate or his son marry a woman of the province, unless betrothed before he held the office. As regards prohibited degrees of relationship, under Constantine, marriage was prohibited with the widow of a deceased brother, and the sister of a deceased wife. The

<sup>1</sup> The priest of some particular deity.

marriage of a man with his brother's daughter was first allowed by Claudius in A.D. 339, but later Constantine restored the old law and declared such marriages incestuous.

#### DOWRY (*DOS*)

One of the important concomitants of marriage in Roman Law is the *dos*. This institution is one of great antiquity. It was given to the husband as a marriage portion to meet the expenses of married life. In Dr. Hunter's words,

"Marriage (*sine manu*) gave the husband no claim of any sort upon the wife's property. But he was under no obligation to maintain her. The Roman point of view seems to have been that it was the duty of a father to maintain his daughter, notwithstanding that she was married. But as it would have been practically impossible to perform this duty day by day and week by week, when the daughter lived under her husband's roof, the father once for all compounded with the husband by giving him a sum down. This sum was called *dos*."

It was generally given by the father, although any person or even the bride herself might furnish it. The dowry given by the girl's father or by any one of her paternal ancestors was called *do profectitia*. If by the wife herself out of her own

property, or by any other person on her behalf, it was called *dos adventicia*: if under an express agreement that it should be returned to the donor on the dissolution of the marriage, it was called *dos recepticia*. The absence of dowry, however, had no legal effect on the validity of a marriage. Usually the amount of the *dos* was settled by a written instrument executed before or after marriage.

In the pre-classical period, there was no legal obligation on the part of the husband or his heirs to return the dowry when the marriage was terminated, whether it was contracted with *manus* or without it. "Once vested in the husband, the *dos* remained his for all purposes and for all time. He was not accountable for it. It never reverted (unless it was *dos recepticia*, in which case the terms of restitution were determined in advance)."

In the classical period and up to Justinian, the law on this subject is clearly stated by Dr. Lee,

"Divorces, and therefore second marriages, became increasingly frequent in the later republic. Correspondingly, the idea gained ground that the woman ought to have her *dos* back when the marriage was dissolved by divorce or by the husband's death. . . . In the case of the wife's predecease the *dos* could not be reclaimed. . . . An exception was admitted with regard to *dos profectitia*, which reverted to the father if alive, otherwise, remained with the husband. In principle, the

husband was always owner of the *dos*, but, in the case specified, subject to a duty of restitution. This was further emphasised by a provision of the *lex Julia de fundo dotali* (part of the *lex Julia de adulteris*) of B.C. 18, which prohibited the alienation of a dotal immovable in Italy without the consent of the wife, and (as interpreted) its hypothecation even with such consent. In the cases in which the law required the husband to restore the *dos* to the wife, he was entitled to retain part of it on various grounds—*propter liberos* (one sixth for each child, when the marriage was determined by divorce due to the fault of the wife or of her paterfamilias, but not more than three-sixths in all)—*propter mores* (one-sixth, if the wife was guilty of adultery, one-eighth for minor faults)—*propter impensas* (for necessary expenses)."

Although *dos* prevailed from ancient times and usually accompanied marriage, it was not legally necessary during the Republican period. But in the Imperial period, the existence of the *dos* was the best indication that marriage was the object in view and not mere concubinage. So parents insisted on giving *dos* and the *lex Julia de adulteris* (B.C. 18)—made it incumbent on the father to give *dos* for his daughter if he had the means.

Justinian by an enactment of A.D. 531 further made inroads on the husband's power of disposition

of the *dos* by forbidding the sale or mortgage of dotal immovable property wherever situated even with the wife's consent.

\*DEVOLUTION OF THE DOS IN JUSTINIAN'S TIME

(a) On the husband's death.

*Recepticia* reverted to the donor according to the agreement.

*Profectitia* and *adventicia* went to the wife if *sui juris*, or to the wife's father if she were *alieni juris*.

(b) On the wife's death.

*Recepticia* reverted according to the agreement.

*Profectitia* and *adventicia* went to the heirs of the wife.

(c) On divorce.

*Recepticia* reverted according to the agreement.

*Profectitia* and *adventicia* went to the wife, or to her father if she were *alieni juris* : unless the divorce took place owing to her misconduct, in that case the husband might take the *dos* absolutely if there were no children ; but if there were children he was allowed to take an estate for life.

"The general result of Justinian's legislation was that the *dos* always reverted to the donor or to the

wife or her heirs, except that if the wife had been divorced for a permitted cause or had divorced her husband not for a permitted cause she forfeited the *dos* for the benefit of the husband, or of the husband and the children. Through all this long course of development the husband was, at first substantially, and always formally, owner of the *dos*."

#### DONATIO ANTE OR PROPTER NUPTIAS

In the later Imperial period, the husband was allowed to make a settlement in favour of the wife, to take effect in the event of her husband's demise or being divorced for no fault of her own, and this was called *donatio ante nuptias*. The settlement became the property of the wife, but it was managed by the husband on her behalf. It could not be alienated or mortgaged even with her consent. In course of time it became obligatory on the part of the husband or his relations to provide the *donatio* and during Justinian's time, the rule was that the *donatio* should be equal in amount to the *dos*. Again, just as in the case of *dos*, the husband had an usufruct over the *donatio* also. When the marriage was dissolved either by death or divorce due to the misconduct of the husband, the wife was entitled to stipulate that the *donatio* should be actually paid over to her and not merely promised to be paid. In respect of both the *dos* and *donatio propter nuptias*<sup>1</sup>,

<sup>1</sup> *Donatio*—gift; *propter*—on account of; *nuptias*—marriage; i.e., a gift given on account of marriage.

Justinian<sup>1</sup> gave the wife a *tacit hypothec* (implied mortgage) over the entire estate of the husband. The rules as to the *donatio* were more or less similar to those as to the *dos*.

#### DISSOLUTION OF MARRIAGE

The modes by which a marriage was dissolved were as follows :

- (1) By death.
- (2) By becoming a slave or being taken captive.
- (3) In cases of marriage in *manum* by either party suffering *capitis deminutio*.
- (4) By Divorce : No judicial proceedings were necessary.

If it was in *manum*, such as *coemptio* or *usus*, it could be dissolved by remancipation. In the case of *confarreatio*, it could only be dissolved by another formal religious ceremony called *diffarreatio*.

In case it was without *manus*, divorce was effected by the free will of either party or by both by mutual consent. If the separation was produced by mutual arrangement, it was called *divortium*, and, if by the act of one party only, *repudium*. As marriage without *manus* was contracted by the mere consent of the parties, it could also be dissolved in the same manner. The Roman jurists went a

<sup>1</sup> Before Justinian, the rule was that all gifts made during coverture by the husband to the wife, or vice versa were invalid. But Justinian altered the law and laid down that gifts between husband and wife were valid whether given before, during, or after marriage. Henceforth *donatio ante nuptias* was called *donatio propter nuptias*.

step further and held that a marriage could be dissolved, even if only one of the parties wished it. This sentiment of absolute freedom as to divorce existed in all ages at Rome; so that by the time of the jurist Gaius, it was thought proper to allow the same freedom, even to marriage in *manum*. A wife could compel her husband to release her from the matrimonial tie by sending a message of divorce as though she had never been married to him. The only restraints on divorce which existed in Roman society were sentiments of morality and public opinion. In course of time this liberty of unrestricted divorce naturally led to its abuse. It was very common at the close of the Republic, and at the commencement of the Empire. In one remarkable instance, one Roman matron is said to have gone "the round of eight husbands in five years".

In the Imperial period, efforts were made to check the great corruption in Roman society, resulting from the absolute freedom of divorce, by legislation, by inflicting punishment on those who were responsible for it on account of their bad conduct. Constantine imposed certain penalties on *repudium*, if it was effected apart from certain specified causes. In addition to the loss of *dos*, the woman might be deported, and the man might not marry again. Penalties were also imposed on persons who mutually consented to terminate the marriage on insufficient grounds. In spite of all these penal statutes, divorce was as a rule effected by the free will of the husband.

and wife, and resort to judicial proceedings was not necessary. Justinian by one of his *Novels* imposed certain restraints on the parties to a divorce, where it was by mutual agreement. But, if one of the parties repudiated the marriage on insufficient grounds, he or she was visited with heavy penalties.

#### LEGITIMATION

The third mode of creating *patria potestas* was by legitimation which came into vogue only in the Imperial period. It was effected in three ways :

- (a) *Per subsequens matrimonium*, i.e., by a subsequent marriage between the parents.
- (b) *Oblatio Curiae*, i.e., by becoming a member of a Municipal Council.
- (c) From Justinian's time, by Imperial *Rescript* or an order of the Emperor.

First, *legitimatio per subsequens matrimonium*, which was introduced for the first time by Constantine. This topic can be best understood only with reference to the institution of *concubinatus*, which came into vogue during the reign of Augustus, and was sanctioned by law. It was merely a permanent union between an unmarried man and an unmarried woman, for whose marriage there was no legal obstacle. The difference between marriage and *concubinatus* was that in the latter case the children were not under the *potestas* of their father. The concubine in later times was called *amica*.

Further, the state of concubinage was not one of promiscuous intercourse. It was subject to restrictions similar to those of marriage. The Romans were at all times monogamous. Hence a married person could not keep a concubine nor could he marry while living with her. Constantine forbade concubinage between Senators and freed-women. Many of the restrictions incidental to a marriage as to forbidden degrees of relationship, marriageable age, consent, etc. were applicable to *concubinatus* also, so that it was rather difficult to distinguish the one from the other. The one certain thing which differentiated them was the absence of *dos* or *donatio*. The difference between the two consisted mainly in the intention of the parties as to whether it was concubinage or marriage.

In the later Empire, though the issue of a concubine was born illegitimate, it could be made legitimate by an act of legitimation, or by the subsequent marriage of its parents, and thus brought under the *potestas* of its father. But illegitimate children born of a concubine had the right to be maintained by their father, even before legitimation, just as in India under the Criminal Procedure Code.

There were two kinds of illegitimate children :

- (1) Those born of parents whose union was not recognised by law. Such illegitimate children could not subsequently be made legitimate i.e., children born of a casual, incestuous, or adulterous intercourse, of whom it may be said "Once a bastard, always a bastard".

- (2) Those persons born of a man and his concubine. Such children could be made legitimate, provided the following conditions were satisfied :
- (i) The concubine must have been a free born woman, and not a freed-woman.
  - (ii) The man must not have legitimate children living at the time of legitimation.

Justinian removed these restrictions so that a man could make his illegitimate children (born of a concubine) legitimate, even if he had legitimate children living at the time. Secondly, in his time legitimation could take place only if the marriage could be regarded as valid when the child was conceived. Thirdly, he insisted on a proper marriage settlement between the parties. Fourthly, he required that the child should ratify the legitimation on attaining age ; it could not take place without his consent, because the natural child was born *sui juris* and the result of legitimation would be to subject him to *potestas*.

The second mode of legitimation was *per oblationem curiae*<sup>1</sup> which was introduced by Theodosius II and Valentinian in A.D. 443. This consisted of making one's illegitimate son a member of a council<sup>2</sup> of a municipality (*decurio*) or marrying one's daughter

<sup>1</sup> "By offering to a municipal council".

<sup>2</sup> To belong to a Municipal Council was an extremely costly function, although an honourable one, and there was a general unwillingness to undertake the responsibilities of the office. To prevent the order of the *decurio* from decaying this system was instituted.

to such a person. By this act, the children were made legitimate so that they might succeed to the properties of their natural father on intestacy ; but it did not make them agnates or cognates of the father's relatives.

The third mode was by a *rescript* of the Emperor, which was brought into vogue by Justinian, who allowed it under special circumstances, as for example, when marriage with the concubine was impossible either because of her death, or for some other valid reason. In such cases he allowed the father to make his children legitimate by a declaration to that effect. This could be done even by a testament, in which case the children might become legitimate after the father's death.

The Christian Emperors looked on concubinage with disfavour, and, finally, Leo, the Emperor of the East, repealed, (in A.D. 887), the laws relating to concubinage as opposed to religion and public decency. "Why", said he, "should you prefer a muddy pool, when you can drink at a purer fountain ? "

#### DISSOLUTION OF PATRIA POTESTAS

The *patria potestas* was dissolved in the following cases :

(1) By the death of the *paterfamilias*. His death had the effect of liberating those who were next in the scale in the family ladder. If a person died leaving unemancipated sons and grandsons in the male line, the sons immediately became *sui juris*, while the

grand-children continued to be under the *potestas* of their respective fathers.

(2) By emancipation. A father could emancipate a son without emancipating his grandsons and *vice versa*. The result of emancipation was to break the ties of agnation with the natural family. The emancipated son was outside the family in which he was born. But all the same he was bound to reverence his father and maintain him, if indigent; and conversely, the father was bound to maintain his emancipated son, if poor. In Justinian's time, it was effected by a mere declaration before the magistrate, the son acquiescing, and by registration in Court.

(3) By a change of status called *Capitis deminutio*. Any change in the legal status of a *filiusfamilias* took away the *potestas* of his *paterfamilias* and *vice versa*. A person, to have full legal capacity, must be free, a citizen, and a member of a family. To lose any of the three elements of status or juristic personality was called *Capitis deminutio*<sup>1</sup> which might take any one of the following three forms :

- (a) *Maxima*,
- (b) *Media*, and
- (c) *Minima*.

(a) *Capitis Deminutio Maxima*: This means loss of a man's entire juristic personality as and when a man lost his liberty, for example, by becoming a

<sup>1</sup> *Capitis*; from *caput*, meaning status; *Deminutio*: Diminution or loss; *Capitis Deminutio*: Diminution or loss of status.

slave, or by being taken prisoner of war<sup>1</sup>. The rule was that, if a man lost his freedom, it meant also a loss of Roman citizenship and his rights in the family

(b) *Media*. This occurred where there was loss of citizenship unaccompanied by loss of liberty. In this case the person lost not only Roman citizenship but he also severed his connections with his agnatic family, that is, he was no longer under the *patria potestas* of his *paterfamilias*. "This happened in the old law when a man was interdicted from fire and water, which meant, in effect, compelled to go into exile, as happened to Cicero in B.C. 58. Under the empire a sentence of deportation (but not of relegation) to an island had the same effect".

(c) *Minima*. This arose in cases where there was merely a severance from one's agnatic family, for this was enough to constitute a loss of legal status in the eye of the law, while the person retained his freedom and citizenship, e.g., by

- (i) marriage in *manum*;
- (ii) *adrogation* or adoption;
- (iii) emancipation;

(iv) the Emperor conferring the title of *patriciate* on a person. Justinian enlarged the number of offices to which this dignity was attached, e.g., being made a bishop, a consul, a *quaestor* of the palace,

<sup>1</sup> In this case a Roman citizen recovered his citizenship the moment he returned from captivity. In other words, he became once more the owner of the family, the owner of his property, and resumed all the legal relations which he had temporarily lost on account of his bondage. But, if he were to die as a captive, he was presumed to have died at the time of capture the *jus postliminium*.

*praetorian prefect*, or a master of infantry or cavalry. In all these cases, though the son was *ipso facto* emancipated, he still remained a member of the family and enjoyed all the rights of succession and agnation. To quote from the picturesque language of the Institutes,

"but our constitution provides that the pre-eminent rank of patrician releases a son from paternal power from the very moment of the granting of the imperial patent. For how can it be tolerated that a father should be able to release a son from the bonds of power by way of emancipation, but that the imperial majesty should not be able to take out of the power of another the man whom the emperor has chosen to be a father of the State ? "

#### X. HINDU LAW OF MARRIAGE

In Hindu Law, unlike Roman or Muslim Law, marriage is a sacrament and not a contract, and therefore Hindu Law does not recognise divorce. The ancient Hindu jurists, like the Roman Catholic Christians, held that "What therefore God hath joined together, let not man put asunder". It may be said that some of the enactments of the Indian Legislature have made inroads into the sacredness of a Hindu marriage. Owing to its sacramental nature, there can be no valid marriage unless certain religious

ceremonies are performed by the spouses such as *saptapadi* or the ceremony of taking seven steps round the sacrificial fire. On the same principle, it is immaterial whether the couple are infants, incapable of giving their consent or otherwise. Again, there is nothing in Hindu Law corresponding to the dower or *Mahar* of Muslim Law or the *donatio propter nuptias* of Roman Law. Further, neither in the Hindu nor Muslim Law is there any thing analogous to legitimation by which illegitimate children born of a concubine could be made legitimate.

#### XI. MUSLIM LAW OF MARRIAGE

In Muslim Law, as in Roman Law, marriage is regarded as a contract. It is, therefore, governed practically by all the rules which determine the validity of a contract, such as offer and acceptance, reality of consent and so on. Even so, marriage being a special kind of contract, it has certain features peculiar to it, as, for example, the parties are presumed to intend life-long union. Being essentially based on agreement, the spouses may put an end to the marriage by divorce usually at the instance of the husband and exceptionally of the wife or by mutual consent. Furthermore, it is necessary that the husband should provide the dower or *Mahar* in consideration of the marriage, which, however, should not be regarded as equivalent to consideration as in a simple contract. It must be borne in mind that in the Muslim, as in Rom-

marriage, absence of dower does not invalidate it. There is, however, one important point of difference between the Roman marriage, which is monogamous and the Hindu or Muslim marriage, which is polygamous.

### XII. ENGLISH LAW OF MARRIAGE

The English Law of marriage is defined as "the voluntary union for life of one man and one woman, to the exclusion of all others". In this respect it resembles the Roman. In the words of Buckland and MacNair,

"there are, however, wide differences between the Roman conception of marriage and that of the modern common Law, both as to form and its effects. With us, at least in modern times, marriage is very definitely a legal institution. It is hedged round by legal formalities, execution of documents, etc. To be recognised as a marriage the transaction must be certified by the State acting by an official, such as the Registrar or a clergyman of the Established Church, or by one authorised to act as such in special cases, e.g., the captain of a British ship. . . .

"The Common Law conception of marriage, which makes the parties one person for many purposes of property law, is in sharp contrast with the Roman view, under which, apart

from *manus*, the marriage produces no effect whatever on property relations."

Further there is nothing in English Law corresponding to the *dos* or *donatio* of Roman Law nor is there in English Law anything comparable to the facility of divorce by which marriage could be dissolved at will. In English Law, divorce can be obtained by either party only through a Court of Law and only on valid proof of certain specified grounds, of which adultery is one.

Regarding legitimation, this was not allowed by the common Law, until the year 1926. But by a statute passed in that year it was introduced into English Law and it resembles the Roman institution in many respects. There are some important points of difference between the two, one of them being that in English Law, legitimation can be effected only by the marriage of the parents.

### XIII. ROMAN LAW OF GUARDIANSHIP (TUTELA AND CURA)

The Law of guardianship<sup>1</sup> is intended to assist defective personality, e.g. an infant, or a lunatic. The guardian or the tutor took the place of the *pater familias* when he was dead. If A died leaving B and C, two infant sons, it was very necessary that somebody should take the place of A to maintain an

<sup>1</sup> In India, the law of Guardian and Ward is partly regulated by the Guardian and Wards Act VII of 1890, and partly by the personal law of the parties, i.e., in the case of Hindus by the Hindu Law, and of Muslims by the Muslim Law,

protect the two infants B and C. There were two kinds of guardians in Roman Law: tutors and curators. Their functions in many respects were similar. Both were chiefly guardians of persons who could not properly take care of themselves. But there were also a few important differences between them which we shall consider later on.

### TUTELA

*Tutela* is defined as "a right and power exercised over an independent person, given and allowed by the Civil Law for the protection of one who on account of his tender age is not able to be his own defender. The persons who exercise this right and power are called tutors (from *tueri*=to defend)." There were four kinds of tutors.

#### (1) TESTAMENTARY TUTORS (*TUTORES TESTAMENTARI*)

They were tutors appointed by a will of the *paterfamilias* to sons or other *filiifamilias* who would become *sui juris* on his death. These guardians being persons chosen by the parent himself were exempted from furnishing security, as they were presumed to be persons of trust and no one but a *paterfamilias* could appoint a guardian by will.

#### (2) STATUTORY TUTORS (*TUTORES LEGITIMI*)

In the absence of a testamentary tutor, where a *paterfamilias* died leaving minor children in his

*potestas* without nominating a guardian, the XII Tables laid down that the nearest agnates should be their tutors. These were known as the statutory guardians of agnates (*legitima agnatorum tutela*). By the time of Justinian, the rules of inheritance had changed so that this form of tutelage devolved on the next of kin whether agnates or cognates. The *paterfamilias* was the *tutor legitimus* of all his emancipated children under age.

#### (3) FIDUCIARY TUTORS (*TUTORES FIDUCIARI*)

These became tutors by operation of law, as for instance, where a *paterfamilias* died leaving an emancipated child under age without appointing a guardian for it. In that case the right of tutelage vested in the nearest male kindred of the child agnatically related to the propositus, e.g., unemancipated brothers, uncles

#### (4) DATIVE TUTORS (*TUTORES DATIVI*)

In default of other tutors, guardians were appointed in Rome by the *Praetor Urbanus* and a majority of the tribunes under the *Lex Atilia* (about B.C. 200). By the *Lex Julia et Titia* (B.C. 31) the guardian were appointed in the provinces by the *praesides*. In the time of Justinian, these appointments were made by the urban *praefect* at Rome and by the *praetotutelaris* where the property of the ward was small. In the provinces, the rule was that where the propert;

of the pupil was under 500 *solidi*<sup>1</sup> the appointment should be made by the municipal magistrates along with the bishop, and in other cases by the *praesides*.

#### POWERS AND DUTIES OF TUTORS

The powers of a tutor extended generally over the person as well as the property of his ward. It was the primary duty of the guardian to take proper care of the pupil's person and education. Besides these functions, his duties were mainly two. Firstly, he had the power of *auctoritatis interpositio* (*i.e.* the authority to intervene between the ward and the outside world in respect of juristic acts). By giving his consent to an act of the ward at the time of the transaction, the guardian enabled him to conclude the act himself. In other words, the essence of *tutela* was that it supplied a method by which a person who could not enter into a contract on his own account because of his tender age was freed from this incapacity, and was enabled to enter into the contract in his own name.

"It was a principle of law that the ward could not incur liability without his tutor's authority. Without authority he might make his condition better (as by stipulating or accepting a gift), but not make it worse. Therefore, unaided, he could not accept an inheritance (which from its nature involved,

<sup>1</sup> *Solidus*—"Under the Emperors a gold coin, at first called *Aureus* and worth about 25 *denarei*, afterwards reduced nearly one half in value".

or might involve, burdens as well as benefits), nor alienate property, nor bind himself by a contract involving reciprocal rights and duties, though the other party was bound to him. Of course he could not demand performance by the other party unless he was himself prepared to do his part. The idea of authority is that the tutor augments or completes the deficient capacity of his ward. The authority must be given by the tutor in person at the time of the act to be authorised. If given by letter or after an interval it was ineffectual. It was something more than a mere consent."

The functions of the tutor varied according to the age of the pupil. In case he was an infant (*i.e.*, under the age of seven years) the tutor represented the pupil and had sole management of his affairs, until he developed *intellectus*. If the pupil was from seven to fourteen years of age, he could act without his tutor only in transactions which benefited him and which did not involve him in any liability, *e.g.*, he could accept a legacy. But if the matter involved the alienation of property or imposing any liability on him, the concurrence of both the tutor and the pupil was necessary in order to bind the ward.

The other principal duty of the tutor was to administer the estate as trustee for his ward, called *negotiorum gestio*<sup>1</sup>. But this right did not necessarily

<sup>1</sup> *Negotior*—to deal; *gestio*—a doing, a performing.

vest in the tutor, for, in some cases, there might be a tutor, even though the ward had no property, just to enable him to enter into contracts with third persons, which otherwise he would be unable to do.

In the early Republican period, it will be observed, the chief reason for which a tutor was appointed was not so much for the sake of the ward but in order to protect his property so that it might not be lost or impaired. Therefore, only those male agnates became guardians who would have succeeded to the property of the infant in case of his death. Guardianship at this time was considered more a right than a duty. In the words of Jolowicz,

"Guardianship (both *tutela* and *cura*) became in the developed law an institution intended, as it is with us, to shield the incapable person from the consequences of his own inexperience, disease or folly, but at the time of the XII Tables this was clearly not its main purpose. It was then assigned (apart from testamentary appointment of tutors) to the successors on intestacy, the very people who would benefit if the ward died without attaining testamentary capacity, for their own, or, at any rate, the family's advantage. This is particularly clear with respect to the *tutela* of women; the agnates were given power over them to prevent their losing the family property or taking it with them in an undesirable marriage. Marriage with

*manus* needed the consent of the guardians, who could thus prevent a match of which they disapproved. The whole institution is in fact one intended to keep the property in the agnatic family."

Later<sup>1</sup>, the conception of guardianship changed—it was no longer regarded as a right but as an office of trust, the main object of which was to protect the ward and his or her property during minority, the tutor being strictly responsible and prevented from deriving any profit from his office. It thus became a burdensome duty, exemption from which was considered as a privilege only to be granted on special grounds. This was due mainly to a statute, (*lex Atilia*), enacted some time about B.C. 186 which laid down that where an infant *sui juris* was without a tutor, or where there was none competent among the kindred to be appointed as a guardian, the *praetor urbanus* should appoint one with the help of the majority of the tribunes of the plebs. So that for the first time in Roman history we get 'magisterial or dative guardianship', and with it a change from the early conception of tutela as being a right to that of guardianship as a duty. Further the praetor gave to the ward a remedy against his tutor, namely, the *actio tutelae*, a bona-fide action<sup>2</sup>, by which the tutor might be called upon to account to his ward for any

<sup>1</sup> In the period subsequent to the XII Tables and before the fall of the Republic.

<sup>2</sup> An action in which equitable considerations were taken into account unlike *actio stricti juris* which was characterized by a strict application of the law and in which equity was not allowed to play any part.

loss occasioned to him by his intentional or negligent mismanagement of the ward's property<sup>1</sup>. Further, a testamentary tutor could not, as under the early law, refuse to take up the duties imposed on him, unless he could put forward some valid excuse recognised by law.

Persons entitled to claim exemption from being Guardians:

- (1) Persons occupying important offices in the State, for example, magistrates.
- (2) Clergymen, professors, doctors, lawyers, etc.
- (3) Men serving in the army or employed in foreign public service.
- (4) Persons who were the fathers of a certain number of lawful children still living—three at Rome, four in Italy, and five in the Provinces.
- (5) Those over seventy years of age.
- (6) Debtors and creditors of minors.
- (7) Persons who were ill, infirm or too poor.
- (8) Minors.
- (9) Exemption could be claimed, on moral grounds, on account of enmity with the ward's father, or litigation with the pupil, or because the parties were related to each other as husband and wife.

#### PERSONS DISQUALIFIED FROM BEING TUTORS

- (1) Slaves.

<sup>1</sup> In the earlier law, the tutor was only liable if he actually misappropriated the property of the ward.

- (2) Foreigners.
- (3) Latins.
- (4) Women,—but Justinian allowed a mother to be guardian, in certain exceptional cases, provided she did not re-marry.
- (5) Minors.
- (6) Persons who were physically or mentally unfit.

#### DUTIES OF GUARDIANS

In the Imperial period, the powers of a tutor were much curtailed and his duties were similar to those of a modern trustee. Firstly, every guardian was bound to exercise due diligence in the conduct of his ward's affairs. He was bound to do everything as he would have done if the property were his own. In other words, he had not only to preserve, but he was also to improve the pupil's property by making suitable purchases of land or lending money at interest, etc. If he failed in this duty he would have to pay damages to his ward.

Secondly, the guardian would be liable to his ward, if he sold his property without an order from a magistrate or if he misappropriated it for his own use. The guardians, except in the case of testamentary tutors or those appointed by a higher magistrate, were required by law before entering on their duties to furnish security by means of sureties or pledges for

the proper administration of their office. In the later Empire, the ward was given a charge by statute over the entire property of the guardian called *tacita hypotheca*.

Thirdly, when the period of guardianship came to an end, the guardian was bound to render an account of his administration and to hand over the property to the ward.

Fourthly, as regards liability, if there were several guardians, each of them was liable for the whole amount, but if the power vested in one single guardian, called the *tutor gerens*, he was, in the first instance, liable, and the liabilities of the others were merely subsidiary, but in cases where there was fraud or misappropriation, a secondary liability also attached to the following persons :

- (1) those who proposed the guardian called *nominatores*.
- (2) the persons who asserted the guardian's fitness for the office in the inquiry before the magistrate, called the *affirmatores*; and
- (3) to the magistrate himself, in case he was guilty of negligence, but only when the appointing officer was an inferior one.

Lastly, the tutor was required to make an inventory of the ward's estate before entering on his duties, and being a trustee, he could not get any part of the property, or do anything connected with it for his

own personal advantage. If he failed in any of his duties, any person might sue for his removal on the ground of misconduct, and condemnation in the action entailed *infamia*.

#### PERPETUA TUTELA MULIERUM

These were guardians of women who were *sui juris* and over twelve years of age, the Roman theory being that even adult women could not conclude juristic acts independently. In the Republican period, the duty of the *tutor mulierum* was mainly to enable the female ward to conclude important legal transactions, like giving of the *dos*, making a will, alienating *res mancipi*, accepting an inheritance, or marrying *in manum* with the help of his *auctoritas* just as in the case of pupils. But the management of her property continued to be in her own hands, for in this case the tutor had no right of administration, or *gestio*. This was the chief difference between *tutela* over an infant and over a woman. In the classical period, from about the 3rd century A.D., the institution of *tutela mulierum* had ceased to be of practical importance for, if the tutor refused to give his *auctoritas*, the woman had ordinarily the power to compel him, except in the case of *tutor legitimus* where the tutor was her own father. The institution of *tutela mulierum* had disappeared altogether some time before Justinian. It ceased at the time of Diocletian. In Lord Mackenzie's words,

" according to the ancient Roman Law, a woman was placed through her whole life under the tutory of agnates when she ceased to be under paternal power, or was not in *manu mariti*. The origin of this kind of tutory was to protect the property of women, and prevent it from being withdrawn from the lawful succession of agnates. For this reason the nearest male relations were appointed tutors. . . .

" Though the tutory of women was rigidly enforced in ancient times, it lost by degrees its primitive character. By the *lex Papia Poppaea*, the privilege of children<sup>1</sup> released many married women from this inconvenient superintendence. A law of Claudius delivered free-born women from the lawful tutory of agnates. . . . Finally, many ingenious expedients were devised to withdraw women from their legal tutors who were found to be troublesome, and to allow them to choose more complaisant guardians, who left them at liberty to do whatever they liked. Vestiges of this degenerate tutory, which had become an idle form, remained as late as Diocletian; but under the emperors who succeeded him it entirely disappeared".

<sup>1</sup> That is to say, a free woman who had three children and a freed woman who had four children were exempt from the tutelage. This privilege was known as the *jus liberorum*.

## CURATORS

There were several kinds of Curators (1) *Cura minorum*, (2) *Cura furiosi*, (3) *Cura prodigi*, (4) Special cases of *Cura*.

First, as regards *Cura minorum*, it was the last to evolve in point of time. This office was first created as a result of the enactment of the *lex Plaetoria* about B.C. 200 which subjected to infamy<sup>1</sup> and criminal prosecution any one who was guilty of fraud in his dealings with persons between fourteen and twenty-five years of age. Later, the praetor introduced the remedy called *restitutio in integrum*<sup>2</sup> by which the fraudulent transaction was rescinded and the minor was restored to his former position, provided the minor applied within a year. The result was that people were disinclined to enter into contracts with such persons—the “favourites of the law”. Hence the practice grew up of appointing curators to look after the interest of the minors in respect of any business of importance. Marcus Aurelius enacted a constitution directing a permanent curator to be appointed on the application of a minor for the general management of his affairs as a matter of course. There were three

<sup>1</sup> *Infamia* originated in the black mark attached to a person's name by the censor. A person subject to infamy was under certain disabilities, namely, the guilty person could not vote, neither could he receive public honours, nor could he bring a public prosecution nor was he eligible for public offices.

<sup>2</sup> *restitutio*: restitution. *in*: in. *Integrum*: of the whole i.e., restitution or restoration of the whole transaction. The praetor simply rescinded the entire proceeding and put the parties just as they were before they concluded it.

cases where the appointment of a curator was obligatory (*i*) when a minor was a party to a suit in a court of law, (*ii*) when he had some payment to receive, (*iii*) when tutors were rendering their accounts at the termination of their office.

The effect of the appointment of the curator was to deprive the minor of the right to administer his own property. The minor could as before enter into transactions which were entirely beneficial to him without the help of the curator. But if he wished to enter into transactions which subjected him to a liability in respect of his property, he had to get the consent of his curator either before, during, or after the transaction. Hence the consent given by the curator was an informal one unlike the *auctoritas* of the tutor.

Secondly, *Cura Furiosi* or guardianship over a mad man of any age. Here the duty of the curator was to look after both the person and property of the ward and, in this respect, the curator resembles the tutor over infants.

Thirdly, *Cura Prodigii* or guardianship over prodigals. These differed from the Curators over mad men, in that the ward was capable of entering into transactions which were entirely beneficial to him or by which he merely acquired something. But he could not conclude a binding contract imposing a liability on him without the consent of the curator.

Lastly, there were some cases where curators were appointed with limited authority and for a limited period, as, for instance, over persons incapacitated by

illness or old age or for the purpose of assisting a tutor.

The appointment of curators was made by a magistrate.

#### **GUARDIANSHIP (TUTELA AND CURA)**

In Justinian's time, there was not much change on this subject. The most important reform which he made was the abolition of the distinction between agnates and cognates; so that the nearest blood relations were eligible for the office of *tutela* whether on the father's or on the mother's side, though women were excluded, as before, from it. He decreed that the mother or the grandmother could be appointed tutor in the absence of a testamentary tutor. As regards the age of puberty, Justinian fixed it at fourteen for men, and twelve for women. Among the persons who were prohibited by him from being tutors or curators may be mentioned:

(1) The creditor or debtor of the pupil, (2) persons under twenty-five years of age; (3) persons employed in the army or navy; and (4) the husband, who could not be the curator of his wife. He forbade tutors to meddle with the ward's affairs until they had made a complete inventory of his property.

#### **TERMINATION OF GUARDIANSHIP**

Guardianship was terminated in the following cases:

- (1) By the death of either the guardian or the ward.
- (2) By the guardian or the ward undergoing *capitis deminutio*.
- (3) In cases where (a) the ward attained majority or (b) a lunatic recovered his senses. But in the case of curators over prodigals their office only terminated after a decree from the magistrate.
- (4) A guardian might be removed from his office by the State either because of incompetency or bad conduct.

*Tutela* and *Cura*—Comparison (as the law was in Justinian's time.)

1. In reality the same idea underlies the conception both of *tutela* and *cura*, viz., the protection of individuals who, though *sui juris*, are physically or mentally incapable of looking after their own interests.
2. The same magistrates<sup>1</sup> appointed both tutors and curators.
3. Both had to make an inventory as soon as they were appointed and to furnish security.
4. Neither could refuse the appointment unless they could show some good ground of excuse.
5. Both might be removed for misbehaviour.
6. Both were liable to be sued for wrong doing or negligence.

<sup>1</sup> A curator could not legally be appointed by will, but if, in fact, he was so appointed, the magistrate had a discretion to confirm the appointment.

7. Neither could alienate the ward's property without the consent of the magistrate and their property was equally subject to an implied mortgage.

#### CONTRAST

- (1) The tutor was generally appointed in the case of a person under fourteen, and the curator for those between fourteen and twenty-five.
- (2) They differed also in the degree of authority originally possessed by them.
- (3) The tutor was appointed for the whole period of the ward's minority, while the curator might be appointed temporarily, i.e., *ad hoc*, for example, to check accounts before the tutor could be discharged from his office.
- (4) There could be no valid appointment of a curator by testament.

#### XIV. HINDU LAW OF GUARDIANSHIP

In Hindu Law, a person is a minor until he completes his sixteenth year or twenty-first year as the case may be. The father, or in his absence the mother, is the natural guardian of the minor for all purposes. No other person can claim to be a guardian of a minor as of right, and anyone, other than the parents of the minor can become a guardian only if appointed by the Court. Unlike Roman Law, the right

of guardianship ceases as soon as the minor attains majority. The natural guardian has the power, among others, to mortgage or sell the property of the minor in case of necessity or for the benefit of his estate. But, so long as a person is a member of a joint family, the head or the manager of the family, has the right of management over the entire joint family property including the interest of the minor.

#### XV. MUSLIM LAW OF GUARDIANSHIP

In Muslim Law, unlike Roman Law, the guardianship of the father over his son's person and property extends only until he attains majority, that is, fifteen or eighteen or twenty-one years as the case may be. There were three kinds of guardians (1) for purpose of marriage ; (2) over person ; (3) over property.

As regards marriage, prior to the passing of the Dissolution of Muslim Marriages Act 1939, the father, and, failing him, the father's father, had the power of giving a minor girl in marriage so as to make it valid and binding on the minor without the power of revocation. But in case she was given in marriage by any person other than the father or paternal grandfather, for example, by a brother or mother, she had the power of repudiating it on attaining puberty. At the present day under the Act she has the power of annulling the marriage, in certain cases.

Secondly, as regards guardianship over person, although the father is the natural guardian, the mother

and other female relations have a preferential right to the custody of a child, if male, until he attains his seventh year, and if female, until she attains puberty. In the absence of the mother and other female relations, the custody of a child belongs to his father, father's father, and so on.

Thirdly, as to property, the guardians of a minor are (a) the father, (b) his executor, (c) the father's father, and (d) his executor. These are the only legal guardians of a minor. For purposes of property a person is considered to be a minor until he completes his eighteenth year. The point essential to a legal guardianship is that in certain cases the guardian is empowered to alienate the immoveable property of a minor, while other guardians, called *de facto* guardians, have no such power, although they could, like the legal guardians<sup>1</sup>, alienate the moveable property of a minor under certain contingencies.

#### XVI. ENGLISH LAW OF GUARDIANSHIP

In English Law, as in Hindu Law, the father is the natural guardian of his legitimate children for all purposes, and, in his absence by death or otherwise the mother. The age of majority is twenty-one years. In many respects since 1925 both the parents have equal rights as regards the guardianship of their legitimate children. Ordinarily an infant canno

<sup>1</sup> The court also could appoint a guardian both of the person and property of a minor in certain cases under the Guardian and Wards' Act which applies equally to Hindus and Muslims.

marry without the consent of parents or guardians but nevertheless an infant's marriage without such consent is valid.

## BOOK II

### THE LAW OF THINGS

#### I. INTRODUCTION

THE Law of Things comprises the following topics :

(a) Modes of acquiring ownership under :

- (i) the *Jus Civile*,
- (ii) the *Jus Naturale* ;

(b) *Jura in re aliena*<sup>1</sup> or rights in the property of others,

(c) Universal succession :

- (i) testamentary succession,
- (ii) intestate succession ;

(d) Obligations :

- (i) Contracts,
- (ii) Delicts.

This classification is substantially the same as in the *Institutes* of Gaius. The mixing up of the law of ownership with inheritance on the one hand and contracts on the other is a matter perplexing to a modern critic. There is not much in common, for

<sup>1</sup> This comprises (i) servitudes, (ii) *emphyteusis*, (iii) *superficies*, (iv) *hypotheca*.

instance, between the law of ownership and inheritance. Various attempts have been made to explain the basis of this division.

The true view seems to be that the rule underlying these topics is that whoever is the owner of a *res* or thing is so much better off either immediately or in the future. If we take this view, we find a principle observable in this division. The laws of ownership, inheritance, or contracts, all deal with things which improve a man's proprietary capacity. That is, if we look at it from the point of view of the promisee in a contract, or the legatee in a legacy, or the beneficiary under a will. In Dr. Buckland's words, "it is the law of *patrimonium*, the discussion of all those rights known to the law, which are looked on as having a value capable of estimation in money—anything, as Dr. Moyle says, by which one is actually or prospectively 'better off', all these expressions being substantially equivalent".

The word *thing* is here used in a wide sense ; to mean (1) any material object such as a chair, or a table, (2) any right, for instance, the right to walk over another man's land, or a right of action, provided it could be assessed in terms of money value.

It was usual among the Roman Jurists to classify property in several ways, the classification depending upon various differences in its nature and relation. "The classifications adopted by the Roman Law are, in the main, the result of historical development or practical convenience. They display little inclination

towards scientific analysis". One mode of such division consisted of (1) things which were capable of being individually owned called *res commercium* or *res in nostro patrimonio*. (2) Things which by a rule of law were not capable of being the objects of private ownership and which were called *res extra commercium* or *res extra nostrum patrimonium*.

First, as to *res extra commercium*, They comprised the following :

- (a) *Res divini juris* ;
- (b) *Res publicae* ;
- (c) *Res omnium communes* ; and
- (d) *Res nullius*.

(a) *Res Divini Juris*<sup>1</sup>. This included,

(i) *Res Sacrae*<sup>2</sup> or objects dedicated to the Gods above the earth, as for example, temples, churches, etc.

(ii) *Res Sanctae* or things which were specially favoured by the Gods, as for instance, the walls of Rome, or the walls and gates of a city.

(iii) *Res Religiosae* : they were things dedicated by individuals to Gods below the earth, such as grave-yards and graves. Land became *religiosus* if a person lawfully buried a corpse in it.

(b) *Res Publicae* : means public or state property which was not owned by private individuals, but

<sup>1</sup> Matter of divine right.

<sup>2</sup> Sacred things.

which every one might enjoy, such as rivers, harbours, etc.

(c) *Res Omnium Communes*: were things common to all men, which, properly speaking, are not susceptible of human dominion as, for example, the air, the sea, the sea-shore, the water of a natural stream, etc.

(d) *Res Nullius*: were things, which at a particular moment of time, belonged to nobody. This phrase is used in various senses:

- (i) it included all things which according to Roman ideas were not capable of being owned privately;
- (ii) specifically it might mean things sacred, religious;
- (iii) things which, though they could be owned are not in the ownership of anyone at the moment e.g., wild animals uncaptured; or things abandoned by the owner (*res derelictae*) . . . To quote Dr. Lee, "All this is very confused. The distinction between things common and things public is ill-defined, and has no practical value."

Second, as to *res commercium*. The Roman Jurists divided *res commercium* into (i) *res mancipi*<sup>1</sup>

<sup>1</sup> In the words of a learned writer: "The *res mancipi* are the privileged things of early Roman Law, the things which are regarded as constituting the staple of farmers, and at the same time, of the nation's property, whose alienation and acquisition, therefore, being a matter of public interest, cannot be effected without publicity and the sanction of the community, the community being represented by the five witnesses or by the magistrate."

*Res nec mancipi* on the other hand are things which under the *jus civile* may be owned or transferred by mere delivery without any formal process, such as *mancipatio*. They are things which anyone could own or acquire irrespective of the fact whether he had the *jus commercium* or not.

and (ii) *res nec mancipi*. (i) *Res mancipi*. The word *mancipi* is derived from *mancipium* which meant that which could be the subject of control or that which could be apprehended. In other words, *mancipium* was the ancient Roman ownership which could be exercised over things called *res mancipi* for the benefit of Roman citizens only. It comprised slaves and beasts of burden like oxen, horses, and asses used for the development of agricultural estates, and to these may be added landed property both in rural and urban areas, and *praedial* servitudes. In short, all things were classed as *res mancipi* which were of a particular importance to an Italian cultivator or farmer. Therefore *res mancipi* could only be acquired by those who had the *jus commercium*. Further they could be transferred only by a formal process called *mancipatio*, the effect of which was to make the transferee a *quiritary* owner. That is, only after this process the purchaser was regarded as the owner under Roman Civil Law.

There is another division into which things were divided, corporeal and incorporeal. The former meant things that could be seen or touched, such as a book, a table; while the latter denoted mere rights in the abstract, such as a right of way, or a right to light and air.

Things were also divided into (1) *res fungibles* being things which were destroyed in the use, as for example, milk, wheat, money, etc., and (2) *res non fungibles* which were things not destroyed in the use,

e.g., a bench, a chair. Again, the Romans divided things into (1) moveable and (2) immoveable. By moveable things they meant objects like a box, a pencil, while immoveable property consisted of lands, houses, the difference between the two resting in the nature of the two classes of things.

## II. MODES OF ACQUIRING OWNERSHIP

The civil modes were :

- (a) *Mancipatio*;
- (b) *In Jure Cessio*;
- (c) *Usucapio*;
- (d) *Donatio*;
- (e) *Adjudicatio*.

The natural modes were :

- (a) *Occupatio*,
- (b) *Accessio*,
- (c) *Specificatio*,
- (d) *Fructum Perceptio*,
- (e) *Traditio*.

The civil law rules were open only to Roman citizens (or those with *commercium*), the natural law methods were open to foreigners as well. In this connection, Justinian ventures a historical conjecture. "It is more convenient," he says, "to begin with the older law, and it is clear that the natural law is the older, seeing that it is the product of Nature herself and so coeval with the human race; for civil rights only came into existence when states were first

founded, magistrates appointed and laws written down." This is no doubt true in a sense but, historically speaking, we know that in Roman Law formality came before informality. Legally the recognition that *mancipatio* gave title certainly preceded the rules of *occupatio*. Hence, let us first confine ourselves to the civil law methods.

(a) *Mancipatio* and (b) *in Jure Cessio*. Both became obsolete by the later Imperial period: and by Caracalla's edict all free persons in the Roman Empire were Roman citizens, therefore, the question as to *jus commercium* had also lost its former importance. The result was that there was no longer any distinction between *quiritary* or *bonitary* ownership and in Justinian's time, every one was full owner of property. These formal methods were employed not only in the case of sale of *res mancipi*, but also in adoption, emancipation, manumission, *coemptio* marriage, etc.

(c) *Usucapio* or *Prescriptio*. If a person happens to be in possession of property as owner but without legal title, all mature legal systems acknowledge him as owner, if he continues in possession for the period defined by law and satisfies other necessary conditions. This is known as acquisitive prescription. In Roman Law, this mode of acquisition was given effect to under the name of *usucapio*.

The reason for the rule as to *usucapio* is given by Justinian, firstly, as to the inexpediency of allowing the rights of ownership to be long unascertained, the principle being, that if it were allowed to be asserted

over an indefinite period of time, there would be no security for all time. Secondly, if this rule were not recognised, everyone, in case his right to own any property were challenged, would be put to the necessity of tracing his title to it through an indefinite chain of the titles of his predecessors. This rule puts an end to this difficulty, provided the owner could show that the following conditions had been satisfied, for otherwise rights of ownership would neither be safe nor capable of proof.

#### CONDITIONS REQUIRED FOR USUCAPIO

(1) According to the XII Tables, a person could become owner of moveable property provided he had the *jus commercium* and was in continuous possession for one year. In the case of immoveable property, two years' uninterrupted possession was required.

(2) The thing should not be *res extra commercium*, such as temples, burial grounds, public roads, etc. Further, certain things could not be acquired in this manner, acquirement being prohibited by legislative enactments, for instance, (a) *res mancipi* of a woman under her agnatic tutor unless given with his *auctoritas*, (b) the property of minors, and (c) immoveable property of religious and charitable corporations.

(3) It was essential that a person should not know at the time of getting the property that it belonged to some other person. Hence, anything

stolen or obtained by force could not be acquired by *usucapio*. The XII Tables enacted that even innocent purchasers of stolen goods could not acquire ownership by *usucapio*. Similarly, land occupied by violence could not be acquired under a *lex Plautia* (about B.C. 77) and a *lex Julia* (probably of Augustus).

(4) There must be a continuous undisturbed possession for the period prescribed by law. If possession was interrupted, the rule as to *usucapio* would not operate and the person must begin over again.

#### *USUCAPIO LUCRATIVA*<sup>1</sup>

There were, however, three classes of cases called *usucapio lucrativa*, where a person was allowed to benefit by *usucapio*, even though he was aware that the property belonged to another. Dr. Moyle classifies them as "three abnormal cases of *usucapio*, in which the ordinary rules were suspended in respect of *bona-fides*, *titulus*, or length of the possession."

First, *usucapio pro herede*<sup>2</sup>. This occurred where a person took possession of the estate of another who died intestate and without heirs, and occupied it continuously for one year, in which case he was allowed to become the owner of the property after the lapse of one year, whether it consisted of moveable

<sup>1</sup> This kind of *usucapio* is called *lucrativa* because a person gets something for nothing.

<sup>2</sup> *Pro*: for the benefit of. *Herede*: hereditary estate.

or immoveable property.<sup>1</sup> This exception was permitted so that the ownership of the property might not remain in abeyance.

Second, *usureceptio*.<sup>2</sup> In this case property was transferred to another on trust by *mancipatio* or *in jure cessio*, so that the transferee (under the civil law) became the legal or *quiritary* owner. If, however, the transferor subsequently got possession again, he might become its full owner by the law of *usucapio* after the lapse of one year even though it was immoveable property.

Third, *usureceptio ex praediatura*<sup>3</sup>. Here, if a person mortgaged his immoveable property to the State and failed to redeem it, and if the property was sold in auction to another, the mortgager in case he regained possession of it could again become its owner in one year.

The principle of *usucapio* was not applicable in the Roman Provinces, for the theory was that all the lands owned by the State outside Italy belonged to the Roman people collectively, and it was regarded as a species of *res extra commercium* which could not be the subject of individual ownership. But nevertheless in course of time the governors or *praesides* of the Roman provinces allowed people to own and possess

<sup>1</sup> Gaius mentions two reasons as to why this institution was allowed namely, (1) the necessity of having some persons to perform the sacrifices to the family Gods, and (2) the need of someone being in charge of the estate of the deceased so that the creditors might know to whom they should look for the payment of their debts.

<sup>2</sup> *Receptio*: reception, a receiving, i.e., receiving back one's estate.

<sup>3</sup> *Preadicatura*: purchase of estates at auction.

such lands and developed a rule analogous to *usucapio* called *longi temporis prescriptio* or *possessio*, which was gradually made applicable both to moveable and immoveable property. The rule as to prescription in the provinces was ten years, if the parties lived in the same province, i.e., *inter praesentes*, and twenty years, if in different provinces, i.e., *inter absentes*. Here, as in *usucapio*, the rules as to *bonafides*, valid title, etc., were equally applicable.

Justinian remodelled the law of prescription and amalgamated the civil law of *usucapio* with the rule as to *longi temporis prescriptio* prevailing in the provinces. He abolished the distinction between Italian lands and provincial lands and enacted that:

(1) in the case of moveable property, the period of *usucapio* should be three years instead of one year :

(2) In the case of immoveable property, whether situated in Italy or in the provinces, the rule applicable should not be *usucapio* but *longi temporis prescriptio*, that is, ten years *inter praesentes*, and twenty years *inter absentes*.

(3) He further introduced a new kind of *usucapio* called *longissimi temporis prescriptio*, which applied both to moveable and immoveable property. In this case thirty years' possession of property made a *bonafide* possessor its owner, although he had no valid title to it and even though it had been originally stolen, provided it had not been obtained by violence.

The differences between *usucapio* and *prescriptio* are :

- (1) *Usucapio* was available only to Roman citizens or those who had the *jus commercium*, whereas *prescriptio* was introduced in favour of persons who were neither Roman citizens nor had the *jus commercium*.
- (2) For *usucapio* the period of limitation was one year for moveables, and two years for immoveables. In the case of *prescriptio*, ten years *inter praesentes*, and twenty years *inter absentes*, where it related to immoveable property, and three years to moveable property.
- (3) *Usucapio* was applicable only to *res mancipi* and property in Italy, while *prescriptio* was applicable to *res nec mancipi*, and particularly to Roman lands outside Italy.
- (4) In *usucapio*, where the property was involved in a suit in a court of law, the period of limitation was not interrupted till judgment was delivered. In *prescriptio* on the other hand the time was counted only up to the time litigation was commenced.
- (5) In *usucapio*, the new owner got the property with all its existing burdens, while in *prescriptio* the acquirer was exempted from all prior liabilities.
- (6) *Usucapio* was a remedy recognised by the civil law and was as old as the XII Tables, whereas *prescriptio* was an invention of the

provincial governors commencing from about the end of the 2nd century A.D.

(d) *DONATIO*

There were three kinds of gifts, namely :

- (1) *Donatio inter vivos*<sup>1</sup>;
- (2) *Mortis Causa*<sup>2</sup>; and
- (3) *Ante or propter nuptias*<sup>3</sup>

(1) *DONATIO INTER VIVOS*

It may be briefly defined as a gift by one person to another without receiving any consideration in return. In the early Republic, the law of gifts was governed by a Statute called the *Lex Cincia*. Under this law all gifts were required to be actually delivered to the donee, and a limit was imposed on the amount that could be given. The donor might otherwise revoke the gift, except where it was in favour of near relatives and patrons or some other privileged person. Under Justinian's reforms, the law on this subject was much modified. He enacted as follows :

(1) that for the validity of a gift no delivery of possession to the donee was necessary and that it could be made by an informal agreement.

<sup>1</sup> *Donatio*—gift; *inter*—between; *vivos*—before his very eyes, living.  
*Donatio inter vivos*—a gift between people who are living.

<sup>2</sup> *Mortis*—of death; *causa*—on account of, or as a result of.  
*donatio mortis causa*—a gift as a result of death.

<sup>3</sup> *Ante*—before; *propter*—by reason of, *nuptias*: marriage.  
*donatio ante or propter nuptias*—a gift given before or by reason of marriage.

(2) that if the gift exceeded 500 *solidi*, it required registration, and even here several exceptions were made, such as those made to the Emperor, or those made by the latter to redeem captives, or to rebuild edifices destroyed by fire. In the case of an unregistered gift in excess of this sum, it was void to the extent of the excess. Further, under Justinian's system if a person promised to give a gift, it was enforceable as a vested pact, according to which the donor was under an obligation to deliver.

(3) a gift could be revoked only in certain exceptional cases, as for example, where the donee was guilty of gross ingratitude to the donor.

#### (e) ADJUDICATIO

This mode of acquisition arose in cases where the judge made a division of property and allotted it to the respective parties in a suit for partition between co-owners and also in actions for fixing a boundary. It was considered a method of acquiring property, for the decision of the judge gave to each person what previously belonged to the co-owners.

### NATURAL MODES OF ACQUIRING OWNERSHIP

#### (a) OCCUPATIO

A person became an owner of a thing, which belonged to nobody, by simply taking possession of it, with the intention of becoming its owner. All

things called *res nullius* were capable of being owned by *occupatio*, for example, wild animals, birds and fishes.

The essence of *occupatio* was taking possession of things having no owner. Hence, if a person threw away a thing with the intention of abandoning his ownership of it, for instance a newspaper, it became *res nullius*, the moment physical possession was abandoned and it was called *res derelictae*. We have to distinguish carefully between derelict property and that which was lost by its owner. In the latter case the ownership in the thing did not cease, for the owner had only lost possession of it. The person who had lost an object was deprived only of its *corpus* or actual physical control, while he still retained his *animus* or the mental element of exclusive use and enjoyment. On the other hand, where a person abandoned an article as worthless, he relinquished both the *animus* and *corpus*. Hence lost property does not come under the principle of *occupatio*, and no one could acquire ownership in it by merely taking possession, the duty of the finder being to restore it to its owner.

#### TREASURE TROVE

*Treasure trove* was classed as *res nullius* and the rule was that half of it went to the finder (*occupans*) and the other half to the owner of the land in which it was found. But, if it was found in his own land, then the owner could keep the whole of it.

## ENEMIES' PROPERTY

In the case of Roman property in the hands of the enemy, the rule was that it reverted at once to its owner the moment it was recovered from his hands, by a fiction of law called the *jus postliminium*, the fiction being that the Roman owner was considered never to have lost ownership of it. Enemy property (whether moveable or immovable) was generally at the disposal of the conquering state, and it did not become the property of private individuals. Sometimes booty might be distributed amongst the soldiers. If, however a person happened to be in possession of enemy property at the outbreak of war, he might take it to his own use.

## WILD ANIMALS

Wild animals became the property of the person who had actually caught them and not merely wounded them. The moment they were out of one's control they again became *res nullius*, and anyone who subsequently got them, became the owner. For the purpose of *occupatio*, it was immaterial on whose land they were caught. The Roman lawyers held that whoever was the first to catch them was owner. The landlord might, however, prevent any one from entering his land. A distinction was made between wild animals and those which had been partially tamed. Ownership in such animals was lost only when they

ceased to have the *animus revertendi*, or the instinct to return to their new abode. This rule applied to all domesticated animals and birds, like deer, pigeons, bees, peacocks.

#### ISLANDS RISING IN THE SEA

In this case also the principle of *occupatio* applied. That is to say, the first in point of time was also the first in point of right, and the first occupant became the owner. The importance of *occupatio* at the present day consists in the fact that it is the source of all modern international law on the subject of capture in war and as regards the acquisition of sovereign rights in newly discovered countries. It has also supplied a popular theory as to the origin of property.

#### (b) ACCESSIO

It is founded on the rule, "accessory falls to the principal". *Accessio* means increase or addition. Where a thing previously existing as an independent thing becomes subsequently an integral part of another thing, it is a case of *accessio*, as for instance, where a person plants a tree or shrub belonging to another in his own soil. In that case the moment the tree took root in the soil, it lost its independent existence, and became a part of the land. Therefore as soon as a thing was an accession all previous rights of ownership in it were destroyed, for it was no longer a

separate thing. Hence the owner of the principal thing became the owner of the accession, even though it might have been owned by someone else before. In the above example, the shrub became by the principle of accession the property of the owner of the land in which it was planted and the previous owner had only the right to recover compensation from the owner of the land according to the circumstances of each case. Similarly, "in the case of accession of a moveable to a moveable the question may be raised which is principal, which accessory? Usually the answer is obvious enough. If a hand is added to a mutilated statue, plainly the hand is accessory. But cases may be imagined in which the solution is not so simple".

As important examples of accession, the following may be noted:

(1) *alluvio*: or "latent increment": This occurred where a river enlarged a piece of land in an imperceptible manner. The land so added became the property of the person who owned the main plot of land by the principle of accession.

(2) Formation of an island in a river. The ownership of the island was determined as follows: if it was in the middle of the river, the owners of the land on either bank of the river might claim it in proportion to their interest in the land bordering it. But, if on the other hand, it was nearer to one riparian owner than another, the island belonged to the owner of the nearer bank. In Dr. Hunter's

words, "If it lay wholly to one side of a line drawn longitudinally along the middle of the stream, it belonged to the owner of the land on that side of the river; if there were more than one such owner, it was divided among them according to the extent of their lands along the bank, the island being supposed to be cut across by lines drawn from their respective boundaries at right angles to the median line of the stream. If the island lay in mid-stream, partly on one side and partly on the other of the median line, then it belonged to the owners on the two banks, their shares being determined by lines drawn as aforesaid". All this arises only if they had the right of alluvium. If they did not, the island was regarded as *res nullius* and it became the property of the first person who occupied it.

(3) In the case of a river forsaking its old course and flowing in another direction, the rule was that the riparian owners of the land on both sides of the river might divide it in proportion to their interest in the land along the banks, just as in the case of an island in the middle of a river.

(4) *Avulsio*. If a public river enlarged a piece of land in a perceptible manner, as for instance, where a large portion of some one's land was detached by the action of the stream and added to another man's land so that it became firmly attached to it, it was known as *avulsio*. The owner of the detached land might claim it before it became firmly attached to another's land.

(5) The next class of accession was called *inaedificatio* (building). If a person built a house on the land of another, it became an accessory to the land on which it was built, according to the maxim that "everything which is fixed into the land upon its surface became the property of the owner of the soil." The builder of the house would have to go without any compensation, if before building it he knew that the land did not belong to him. But if he built a house believing honestly that the land was his and if he still continued to be in possession of it, he was entitled to be in possession and was entitled to compensation, before he could be evicted from it. If on the other hand a man built on his land with another's materials, believing by mistake they were his, they became an accession to the land. But their owner could claim compensation for the wrong done to him. If, however, he took them with an evil intent, he would be guilty of theft. The main principle in all these classes of cases is that the owner of the principal thing became the owner of the accession also.

(6) *Confusio*: This occurred when two liquids belonging to different persons got mixed up, e.g., whisky and soda. In this case the mixture became the common property of both the owners, whether it was effected by mutual consent or not.

(7) *Commixtio*: In this case there was a mixing up of solids belonging to two different persons, as for example, two flocks of sheep or two heaps of books. If this was done with the consent of the owners, the

mixture was the common property of both, and would be divisible *pro rata* between the previous owners, but, if it occurred by mere accident, there was no change of ownership, and each could claim his own property. "If my sheep are mixed with yours, plainly there is no change of ownership. Theoretically the case is the same if my grains of wheat are mixed with yours. Each grain retains its identity."

(8) *Scriptura* and *Pictura*. In the case of a person writing a poem or book on another's paper, it belonged to the owner of the paper, because curiously enough, the Roman jurists considered the poem (or the book) to be an accession to the paper which was regarded as the principal thing. But a distinction was made in the case where a man painted a picture on another's canvas. Here the picture was considered to be the principal thing. Hence the painter became the owner of the canvas. In all these cases, two things were essential ; (i) if the painting was in the possession of the painter, he was obliged to pay compensation to the owner of the canvas, (ii) the painter must have obtained possession of the canvas *bonafide*.

#### (c) SPECIFICATIO

*Specificatio* is the converting of another's materials into a new form or species. It may be regarded, as Dr. Hunter remarks, as a special kind of *accession*. In other words, it is a case of accession of one's labour to another's moveables as for example, where A makes

wine out of B's grapes. The Proculians were of the opinion that the product belonged to the maker, as something new had been created with the materials, "a thing which previously had no existence and no owner". The Sabinians on the other hand held that it was a kind of *accessio*, and were of opinion that the owner of the materials was the owner of the production also, for without the material the finished product could not have come into existence. Justinian, however, took an intermediate view. He held that (a) in case the workman owned any part of the material, the *nova species* belonged to him, (b) if he owned none of the material the rule was as follows :

- (i) if it was reducible to its original elements, it belonged to the owner of the material, e.g., a gold ring or silver cup.
- (ii) if not, the maker of the thing should be considered its owner. He must, however, pay compensation for the materials. It cannot be said, as Dr. Lee remarks, that Justinian's solution is better than the views of either the Proculians or Sabinians.

(d) *FROCTUUM PERCEPTIO*<sup>1</sup>

This means gathering or taking the fruits of things. The owner of property ordinarily acquired

<sup>1</sup> *Fructus*; Produce, fruit, *Perceptio*—a gathering or collecting. *Fructum Perceptio* means gathering of produce.

its produce by reason of his ownership. But sometimes a person other than the owner might own the fruits by gathering them, as for example, a lessee or usufructuary, who did not become their proprietor until they had been actually gathered. Hence, the right to take the produce not harvested on the date the period of lease expired belonged to the owner of the land.

(e) TRADITIO

*Traditio* is transferring ownership in a thing by a mere delivery. It was effected by a simple process without any of the cumbersome formalities of the ancient forms of civil law such as, *mancipatio* or *in jure cessio*, and therefore it was classed among the natural modes of acquisition.

The essential elements of this mode of transfer were:

- (1) The thing should not be *res extra commercium* which could not be the subject of private ownership.
- (2) The transfer should be by the owner or his duly authorised agent, and the transferee should be competent to acquire ownership. There might be cases in which a non-owner could convey to another, e.g., a curator might alienate his ward's property in the course of his official duty, while an owner might be unable to transfer

ownership e.g., a husband could not alienate immoveable property comprised in the *dos*, though in theory he was considered to be its owner.

- (3) There should be an intention to transfer ownership by the transferer to the donee who must intend to receive it. It was not necessary that the aim to confer ownership should be in favour of any particular individual. This may be illustrated by a classical example, *viz.*, when money was thrown to a mob, the person who picked it up acquired a good title to it.
- (4) There should be an actual or constructive delivery of the thing to the transferee as for example, by handing over the keys of a warehouse so that the latter may be put in possession of its contents.
- (5) There should be some just cause or valid reason for the transfer, sale, gift, etc.

*Traditio*, though at first confined to the transfer of *res nec mancipi*, gradually came to be employed for the conveyance of all kinds of property owing to its simplicity. Even in the case of *res mancipi* the praetor gradually began to protect the *bonafide* transferee, in cases where the transfer has been effected without the formalities required by the civil law. He conferred on the transferee what is called *bonitarian* ownership and protected his possession for the period required

under the law of *usucapio* until his title to the property became complete by granting him an action called the *actio publiciana*. By this means the *bonafide* purchaser, although he had no title under the Civil Law, was secured in the practical enjoyment of his ownership.

### III. ENGLISH LAW OF PRESCRIPTION OR LIMITATION

The Law on this subject, in England and in India, is found in the statutes of Limitation. In the words of Buckland and McNair,

"under Henry VIII the system was altered and definite periods were fixed, varying according to the kind of action; these periods have been progressively shortened, but the matter is always conceived as the barring of an action (and since 1833 the extinction of title) and not as the establishment of an ownership. But in the Roman Law all this is reversed. In principle there is no limitation of actions for the recovery of property : they are *actiones perpetuae* in classical law, though the principle of limitation creeps in the later law when all actions, with a few exceptions, are barred by the lapse of thirty years. But though a man's title could not be barred by mere lapse of time it might be barred by the fact that, in the meantime, someone had acquired ownership by long

possession . . . As we have already noted, this *usucapio* is definite acquisition of ownership, not a mere bar."

In England, under the Limitation Act of 1939, and in India, under the Limitation Act, 1908, the Law lays down definite periods in which various kinds of actions are barred.

#### IV. RIGHTS IN THE PROPERTY OF OTHERS (*JURA IN RE ALIENA*)<sup>1</sup>

Ownership may be said to consist of the following rights: right of user, right of enjoyment, and right of disposition.

"If all the rights over a thing were centred in one person, that person would be the owner of the thing, and ownership would express the condition of such a person in regard to that thing. But the innumerable rights over a thing thus centred in the owner are not conceived as separately existing. The owner of a land has not one right to walk upon it and another right to till it. . . . All the various rights which an owner has over a thing are conceived as merged in one general right of ownership. . . . It is no more conceived as an aggregate of distinct rights than a bucket of water is conceived as an aggregate of distinct drops."

<sup>1</sup> *Jura*: rights. *In*: in. *Re*: thing or property. *Aliena*: another. *Jura in Re Aliena*: rights in another's property.

Ownership may be regarded in a limited sense, as a right to one's own property *in re propria*; as distinguished from *jura in re aliena*, rights over another's property, such as easements or mortgages. In Dr. Hadley's words,

"The oldest of those rights were mentioned in the Code of the Twelve Tables, and have a peculiar interest, from their connection with the simple agricultural life of the early Romans. They were called by the quaint name of *servitutes* (servitudes, or subjections). The subjection referred to in this case is of things, not persons: it is the subjection of one estate to another—the liability of one estate to be used for the advantage of another. It is easy to trace the conception which gave rise to the term. A country is free when it is subject only to its own legitimate ruler: if it is subject to another country, or to the ruler of another country, then it is in a condition of servitude. So an estate may be looked upon as free when it is subject only to its lawful owner; if it is subject in any respect to another estate, or to the owner of another estate, it may be regarded as being so far forth in a condition of servitude."

*Jura in re aliena* were divided into four groups:

- (a) *Servitudes*
- (b) *Emphyteusis*

- (c) *Superficies*
- (d) *Pignus and Hypotheca*

(a) SERVITUDES

A servitude is an incorporeal right, and may be defined as "a proprietary right vested in a definite person or annexed to the ownership of a definite piece of land, over land or other property belonging to another person, and limiting the enjoyment by that person of his property in a definite manner". There were two kinds of servitudes<sup>1</sup>, namely, (1) personal and (2) *praedial*<sup>2</sup>.

Personal servitudes are servitudes created for the benefit of some definite person and not in favour of an adjoining house or a piece of land. That is to say, persons and not land are the beneficiaries. They were recognised by the Civil Law.

Modes of creating personal servitudes :

- (1) *in jure cessio*; obsolete by Justinian's time;
- (2) in later law, by agreement, i.e., pact or stipulation;
- (3) will;
- (4) adjudication;
- (5) *usucapio*;

<sup>1</sup> The classification of servitudes into personal and *praedial* dates from the classical times in the Imperial Period.

<sup>2</sup> Servitudes are either positive or negative. As an example of a positive servitude may be mentioned the right of a person to allow his rain water to flow into his neighbour's court-yard; and of a negative servitude where the owner of a house or land is obliged not to obstruct the neighbour's right to light and air.

- (6) statute;
- (7) *deductio*; by making "reservation on a grant".

Modes of extinguishing them :

- (1) the death or *capitis deminutio* of the beneficiary of the servitude. Before Justinian, only *capitis deminutio maxima* and *media* ended the servitude;
- (2) non-use for the period of *usucapio*;
- (3) merger or consolidation. When the interests of the holder of the servitude and the naked owner vested in one and the same person;
- (4) renunciation or voluntary surrender;
- (5) destruction of the subject matter.

There were four kinds of Personal Servitudes :

- (1) *usufructus*
- (2) *usus*;
- (3) *habitatio*; and
- (4) *operae servorum vel animalium*.

#### (1) USUFRUCT (*USUFRUCTUS*)

It consisted of the right of using a thing belonging to another and of taking its fruits or profits, leaving its substance unimpaired. It could be created in respect of lands, houses, slaves, and beasts of burden, such as horses, mules, etc. and it might be for the life of the usufructuary or for a definite period of time.

## RIGHTS AND DUTIES OF USUFRUCTUARY

(1) He had the right to take all the fruits or profits accruing from the property over which he had an usufruct, provided he reaped the harvest before the expiry of his rights in it. In case he died before gathering them, no right passed to his heirs.

(2) He had a right to appropriate the offspring of animals, but not of slaves. This reservation was due to the fact that the latter were human beings and could not be treated in all respects like animals. The issue of female slaves, therefore, belonged to the owner of the slaves and not to the usufructuary.

(3) An usufruct could not be alienated or transferred. The usufructuary was allowed only to cede the enjoyment of his rights, but not to release himself from the obligations which the usufruct imposed on him. He was responsible to the owner of the property, although he might allow others to exercise his rights over it.

(4) It was his duty to manage the estate in a prudent manner and to keep it in good repair, as for example, to replant fruit trees in cases of decay or destruction. In other words, he "must cultivate in the right way and use the property like a good father of a family".

(5) He could only use the property in the manner agreed upon. In the case of a slave who was an artist, he could not exact menial services from him. Further, he could not make substantial alterations in

the nature of the property. He should restore it to its owner just as he received it, for instance, a rose-garden could not be converted into an orchard, although it might be more profitable to its owner. In Dr. Hunter's words, "The usufructuary of a house must not alter the character of the building. He must not divide one room into two, or throw two into one, or turn a private dwelling house into a shop. He was not allowed even to put a roof on bare walls. He could not put up a new building, unless required for strictly agricultural purposes; and he could not pull down any building, even one he had himself put up. Thus we learn where Coke got his idea that if the life-tenant put up a house, it was waste, and if he pulled it down again, that was double waste".

(6) The usufructuary might be asked to furnish security, called *cautio usufructuria* for the due performance of his duties.

Properly speaking there could be an usufruct only in respect of things not consumed in the use, and not over things called *res fungibles*, such as money, wine, oil, wheat, etc. which perished in the use. During the reigns of the emperors Augustus and Tiberius, a *quasi usufruct* was created even as regards *res fungibles* by a *senatus consultum* (date unknown). In this case, the usufructuary was bound to furnish security to restore so much in quantity and value as he had received, or to pay money equal in value to the things appropriated by him on the termination of the right.

(2) USE (*USUS*)

It consisted merely in the bare use of the thing without the right to take the fruits of the property beyond what was required for the daily wants of the *usuarius* and his family. If the right consisted of the use of an agricultural farm, he could take as much vegetables and firewood as was absolutely necessary for the maintenance of himself and his family. Hence it was limited in scope, and was a lesser right than *usufructus*, which included both the use of the thing plus the right to all the fruits of the property. Besides, the *usuary* could not allow any other person to enjoy his rights as an *usufructuary* could do. Hence he could not let or transfer his rights to another and he had absolutely no power of alienation. If the right was to the use of a house, he could occupy it himself with his family, but it was doubtful whether he could receive a guest.

(3) *HABITATIO*

It may be defined as a special kind of *usus* which consisted in the right of dwelling in another's house and it differed but little from the right of using a house. From the time of Justinian it carried with it the right to let to a third person. The difference between *habitatio* and *usufruct* or *usus* was that, unlike the latter, the former was not destroyed by the owner of this servitude suffering

*capitis deminutio minima*, or by non-use of it for a time.

#### (4) OPERAE SERVORUM VEL ANIMALIUM

This was a special form of *usus* which was applicable only to slaves and animals<sup>1</sup>. It did not terminate with the death of the person who had the right, but it ceased only on the death of the slave or the animal subject to the servitude. Further, like *habitatio*, it was not extinguished by *capitis deminutio minima*, or by non-use. The rights to *operae* passed also to the legatee's heirs.

### PRAEDIAL SERVITUDES\*

A *praedial* servitude is defined by Prof. Jolowicz as "right vested in the owner of one piece of land (the 'dominant estate') to do something on a neighbouring piece of land (the 'servient estate')<sup>2</sup> or to prevent the owner of that estate from doing something which he would otherwise be at liberty to do".

### MODES OF CREATING PRAEDIAL SERVITUDES

(1) *In Jure Cessio*. This was employed in the case of all *praedial* servitudes.

<sup>1</sup> The services of slaves were called *operae servorum*, and of animals *animalium*.

<sup>2</sup> *Praedial* comes from the word *praedium* meaning a piece of land.

<sup>3</sup> The land, which had the benefit of a servitude was called the dominant tenement and the one subject to it was called the servient tenement.

- (2) *Manicipatio*, in the case of rural *praedial servitudes*, as these were considered *res mancipi*. They could also be created by *in jure cessio*. These two forms were applicable to land in Italy. Both these, however, became obsolete by Justinian's time.
- (3) Testament or legacy.
- (4) *Deductio*. This was done by reserving the servitude while conveying the ownership. If, for example, a person sold a portion of his land to another, he might reserve a right of way across the land sold.
- (5) *Adjudicatio* or judicial decision. The judge while making a partition of the property between co-heirs might create a servitude in favour of one of the parties.
- (6) *Usucapio* might also be mentioned as one of the ways of creating servitudes, for the person who acquired a property by *usucapio* also got the right of servitude annexed to the property. But it is doubtful now, if servitudes as such could be acquired by *usucapio* independently of the property to which they were annexed. For, being incorporeal rights, they were considered incapable of being acquired by *usucapio* as they did not admit of actual possession. Later on by the *Lex Scribonia* (date uncertain) it was definitely laid

down that no servitude could be acquired by *usucapio*.

- (7) Agreement i.e., by pact and stipulation.

#### MODES OF EXTINGUISHING PRAEDIAL SERVITUDES

- (1) Renunciation or surrender.

(2) Merger, where the owner of the servient tenement became also the owner of the dominant tenement, as for instance, if A died leaving his neighbour as his heir, the interest of A became merged with the property of his successor.

(3) Non-use of the right for a time prescribed by law.

(4) Efflux of time. "This is a departure from the general quality of perpetuity, which is in principle characteristic of praedial servitudes, distinguishing them from personal servitudes, which are determined (at latest) by the death of the person entitled."

#### PRAEDIAL SERVITUDES—INCIDENTS

These were divided into (a) Rural or rustic, and (b) Urban.

(a) *Rural servitudes*. They were easements in respect of land, while urban servitudes related to houses and buildings. Therefore there could be rural servitudes in the city, or urban servitudes in the country. As between rural and urban servitudes, the former were the most ancient, as they were quite

necessary for the needs of agricultural development. The typical examples of rural and urban servitudes are :

- (1) *Iter*, the right of passage on foot or horse-back over another's land ;
  - (2) *Actus*, the right of passage for light vehicles or cattle ;
  - (3) *Via*, the right to use the road for all purposes including the dragging of heavy articles. It included *iter* and *actus*, and further the owner of this right could compel the owner of the servient tenement, to have the width of the road maintained uniformly according to a rule in the Twelve Tables ;
  - (4) *Aquaeductus*, the right of leading water over another's land ;
  - (5) *Aquaehaustus*, the right of drawing water ;
  - (6) Watering cattle ;
  - (7) Pasture ;
  - (8) Burning lime ;
  - (9) Digging sand, etc.
- (b) *Urban servitudes* :
- (1) The right of lateral support.
  - (2) Similarly, the right to have a beam of one's house inserted into the wall of one's neighbour's house.
  - (3) The right of discharging rain water from one's house on to one's neighbour's premises.
  - (4) The right of ancient lights and prospect.

## GENERAL CHARACTERISTICS OF PRAEDIAL SERVITUDES

First, a *praedial servitude* could not be alienated or transferred apart from the property to which it was annexed. That is to say, the right "runs with the land". For example, in the case of two adjoining plots of land, where the owner of one plot has a right of way over the other, whoever is the owner of the dominant tenement is also the owner of the right of way.

Secondly, the owner of the servient tenement could not be compelled to do anything positive in respect of the owner of the dominant tenement except in cases where a person has the right of lateral support or other cases of a like nature, for example, where one was bound to support another's beam by his wall. Here the owner of the servient tenement was bound to keep the wall in good repair.

Third, no person could have the right of servitude over his own property.

Fourth, servitudes<sup>1</sup> are indivisible in their nature. They could not be acquired, exercised, or lost in parts. That is what is meant by saying "there cannot be servitude of a servitude". In other words, there

<sup>1</sup> The differences between personal and *praedial* servitudes are :

- (i) Personal servitudes are in favour of a definite person, whereas *praedial* servitudes are connected not with a person but with a thing, such as land or a house.
- (ii) Personal servitudes are terminated on the death of the person entitled to the servitude. At best, these rights could not be enjoyed for more than a life time, while *praedial* servitude could be enjoyed until the land or house itself was destroyed
- (iii) Personal servitudes are far wider in scope than *praedial* servitudes so far as the extent of the rights are concerned but the

could only be a servitude in respect of tangible property and not over a mere incorporeal right. To quote Dr. Lee, "The explanation is simple. A servitude is a burden on land. It cannot be laid on the land by one who is not the owner."

Lastly, they are the product of the Roman Civil Law.

(b) *EMPHYTEUSIS*

It is derived from a Greek word meaning to cultivate. It may be defined as a lease of land in perpetuity or for an indefinite time in consideration of an annual money payment to the lessor. Its origin can be traced to the practice of encouraging private persons to occupy lands belonging to the Roman State taken in war as lessees. Subsequently, municipal and religious corporations also adopted this system of leasing out agricultural land for a long period, as it was found convenient and profitable to do so. Gradually, its term was extended, so that ultimately it became a lease in perpetuity. In the Eastern provinces of the Roman Empire, it became the usual form of tenure, especially with regard to waste land, and it was largely adopted, not only in respect of lands belonging to the State and the Emperor, but by private owners of big estates as well. In Gaius' time,

are much more restricted from the point of view of the period of their duration. *Praedial* servitudes are the reverse of the former. They might last for ever but they were, comparatively speaking, very much restricted as to the nature of the rights they conferred.

it was regarded merely as a species of tenancy, which conferred on the lessee only rights *in personam* against the lessor in case his possession was disturbed. Later, it was considered not a right *in personam* but a right *in rem*, even as against the lessor, provided the lessee had made no default in payment of rent. When it reached this stage, it became doubtful as to whether it was a case of lease or sale. Some considered it, half lease, half sale. Ultimately, by a constitution of Zeno (5th century A. D.) it was decreed that it was neither lease nor sale but a class by itself with special rules of its own.

#### *EMPHYTEUSIS—HOW CREATED AND EXTINGUISHED*

It was usually created either by contract or by testament. If the land belonged to a religious or charitable corporation, writing was necessary for its creation. The annual rent paid by the tenant, *emphyteuta*, was called *vectigal* or *pensio* or *canon*, and the land *ager vectigales*.

It was extinguished in the following ways :

- (1) renunciation or voluntary surrender ;
- (2) the total destruction of the property ;
- (3) merger or consolidation ;
- (4) forfeiture of the right.

#### *RIGHTS AND DUTIES OF EMPHYTEUTA*

(1) He had a right to the use of the land almost as complete as that of the owner, unlike the usufructuary, who was subject to many limitations.

(2) He had the right freely to alter the nature of the land, but not so as to damage it permanently.

(3) His rights were heritable and alienable by sale, mortgage or will. The fruits belonged to him as soon as he separated them from the soil.

(4) He was obliged to pay the rent and all taxes imposed on the land. If he made default, he might be evicted from the property, provided he failed to pay rent for a period of three years.

(5) The owner of the land had the right of pre-emption, i.e., the *emphyteuta* could not sell his right to use the land without first giving the owner the option of purchasing his right. But if he declined to purchase, the *emphyteuta* could sell his rights to whomsoever he pleased without the owner's consent. In that case the landlord was bound to admit the buyer into possession, but he had the right to claim a fine or commission of two per cent on the purchase money.

(6) He could not claim any compensation for the improvements effected by him on the property, nor was he entitled to any remission of rent for bad seasons, unlike the ordinary tenant.

The importance of *emphyteusis* consists in that it occupies an important place in the history of land tenure. As Sir Henry Maine remarks, it constitutes the beginnings of feudalism which, like *emphyteusis*, is practically a system of "double ownership".

## (c) SUPERFICIES

*Superficies* was, like *emphyteusis*, a case of very long or permanent tenure. It differed from the latter in that it related to buildings erected on another's land. It was a perpetual lease of a building. The person entitled to this right, called *superficarius*, had only the right to occupy the house on payment of an annual rent, while the property belonged to the owner of the land. The incidents of *superficies* are practically the same as *emphyteusis*.

(d) MORTGAGE—*PIGNUS* AND *HYPOTHECA*

A mortgage is best explained by an example. If X owes money to Y, Y's only remedy was against X, and, if X is unable to pay, his debt is of no use to Y; but in a mortgage Y is given property which could be sold and converted into money, if X fails to discharge his debt. Such is the nature of a mortgage; it gives valuable rights, rights *in rem*, to the creditor in respect of some specific property of the debtor. So far as the debtor or mortgagor is concerned, a mortgage may be viewed in another aspect; it is a way by which he may, without selling his property, obtain a temporary accommodation. This was effected in early Roman Law by means of a simple device. "An actual conveyance was executed by the borrower to the lender, with an agreement (*contractus fiduciae*) that if the purchase money were repaid by a day named, the

lender would reconvey the property to the borrower. The conveyance was formal and effectual in law to vest the ownership in the lender. How long this continued to be the only mortgage known to Roman law it is not easy to guess; but at some period unknown a revolution in the character of the mortgage was very quietly accomplished by a simple edict of the Praetors". This form of mortgage was called *fiducia* and it had many obvious disadvantages:

First, the debtor was very much at the mercy of the creditor who was in law the owner of the article, and was entitled to deal with it just as he liked. He might, for instance, refuse to receive payment of the debt and retain the property.

Second, by the time the debtor paid back the money the creditor might have sold the thing to some third person, and in such a case, the debtor had no means of recovering the property itself, although he was entitled to claim damages from the creditor.

Third, the debtor lost the possession and the ownership of the property.

Fourth, *Fiducia*<sup>1</sup> applied only to *res mancipi*.

#### PIGNUS

Owing to these defects, the *praetor* introduced a new kind of mortgage called *pignus*. It was a pledge. Here the debtor was not obliged to transfer the

<sup>1</sup> It became obsolete sometime in the Imperial period long before Justinian.

ownership to the creditor, but in order to make the creditor's position secure, he had to put him in possession of the property. Hence, *pignus* approached the true modern conception of a mortgage. That is, it was merely a delivery of an article to a creditor as security for money lent by him, but *fiducia* cannot be called a mortgage in the modern sense of the term.

*Pignus* too had its defects. First, the debtor, although he continued to be the owner, was not in possession of the thing, and was deprived of its use. The creditor, on the other hand, was in a worse plight; for he could not make use of the article in his charge, not take the fruits or profits accruing from it in the absence of a contract to the contrary. Second, if the debtor failed to redeem his property, the creditor had no adequate remedy. Third, only things capable of physical delivery could be pledged. Fourth, the same thing could not be given as security to different persons, though the value of the article might be sufficient to cover all the debts.

#### HYPOTHECA

In course of time, the praetor introduced another form of mortgage called *hypotheca* which may be defined as a mortgage of moveable or immoveable property, in which both ownership and possession of the object mortgaged continued to be with the debtor. It was, like *pignus*, a mortgage in the real or modern sense of the term. It is of Greek origin, and originated

in the custom of letting out estates for cultivation to small farmers by owners of big estates. The tenants had nothing to call their own, except the farming stock consisting of articles necessary for carrying on agricultural operations. Therefore, *pignus* was unsuitable in their case, for they would have to place their stock as security to their landlords for rent due by them, and the tenant would have to part with the possession of the very articles which enabled him to raise a crop and give the rent to his landlord.

In this case the praetor gave to the landlord a double remedy, namely, the right to obtain possession of the thing mortgaged by the *interdictum salvianum* and to bring it to sale by the *actio serviana*. Subsequently, this privilege was extended by the *actio quasi serviana* to any person who might enter into this form of agreement, for which no formality was required, not even writing. In this manner *hypotheca* developed into a pledge by a mere informal contract without the necessity of parting with the possession of the property.

*Hypotheca* had the following advantages in its favour :

(1) The debtor was left with the possession and ownership of the article, while the creditor was, at the same time, fully protected in his rights by a real right of action by which he could obtain possession of the thing mortgaged to him, and on the failure of the debtor to pay his debt, could realise his debt by the sale of the property.

(2) Any property could be the subject of mortgage, for there was no necessity for actual delivery of possession to the mortgagee as in *pignus*.

(3) The same object could be mortgaged to different persons, for different debts, at different times.

(4) There could be a *hypotheca*, not only over a particular portion of a debtor's estate, but also in respect of his whole property, e.g., the tacit hypotheca in respect of *dos* and *donatio propter nuptias*.

*Pignus* and *Hypotheca* were created in the following ways :

1. contract ;
2. will ;
3. statute.

They were extinguished as follows :

- (1) destruction of the thing pledged ;
- (2) merger or consolidation of interests by operation of law ;
- (3) discharge of the debt ;
- (4) limitation of actions under certain circumstances ; and
- (5) voluntary release either by legacy or agreement *inter vivos*.

#### RIGHTS AND DUTIES OF MORTGAGOR AND MORTGAGEE

(1) If the mortgagee was in possession of the property, he was bound to exercise *exacta diligentia* or the standard of care of a prudent man of business

(2) If the thing was lost or destroyed while in the mortgagee's possession, he was still entitled to enforce his claim, provided it was due to no fault of his. But he was liable for wilful negligence and for wrong-doing.

(3) In the absence of a contract to the contrary, the mortgagee in possession of the property was bound to account to the debtor for all profits derived from it. He was also bound to adjust the profits derived from the property towards the liquidation of the principal debt.

(4) The mortgagee had a right to be reimbursed in respect of the money spent by him in preserving the property, e.g., repairing the house.

(5) In the case of *pignus*, the mortgagee was bound to give possession of the property to the mortgagor on payment of the principal and interest, unless the latter had contracted other debts with the former. In that case the mortgagee had the right to keep the property as security for the other debts.

(6) The mortgagee had the right to sell and to recover his debt out of the proceeds of the sale of the property on the expiry of the time agreed upon, provided he had previously given notice of his intention to sell. He was bound to return to the debtor any surplus that might be in his hands on the sale of the property after deducting the money due to him. This right to sell the property mortgaged is an inherent right of the mortgagee who could exercise this right even though there was an express agreement to the

contrary. But the creditor could not sell the property until the expiry of the day fixed for payment. Generally speaking, the manner and time of sale depended upon the agreement of the parties.

(7) In case no purchaser could be found, the mortgagee had the right of foreclosure. That is, he was entitled to keep the thing himself in lieu of the debt due to him. Prior to Constantine, the mortgaged property was forfeited to the mortgagee, the moment the mortgagor failed to pay on the appointed day, but Constantine abolished the foreclosure clause or *lex commissoria* as being a clog on the equity of redemption.

In Justinian's time, the law was as follows :

(1) The sale had to be put off until two years had elapsed from the time the mortgagee gave notice to the mortgagor demanding payment of his debt.

(2) In case no purchaser could be found, the mortgagee had a modified right of foreclosure which is described by Buckland as follows : "If no purchaser was found, a *judex* would fix a time for payment. If payment was not made by that time, a further decree was issued on application, declaring the creditor, owner. The debtor could still redeem within two years by paying debt, interest and costs."

(3) If the same property was mortgaged to several persons and if the value of the property was less than the total amount of the money borrowed on it, the question arose as to which among those mortgagees should have priority over the others in the matter of payment. The rule was as follows :

(a) A mortgage written and executed in the form prescribed by law had preference over one which was not executed with the necessary formalities, e.g., by a public deed, or a document signed by three witnesses.

(b) If all the mortgages were created in an informal manner, without writing or without witnesses, they took effect according to priority of time: the first in point of time was also the first in point of right. But there were certain privileged *hypothecae* which had preference over others. Examples of such were the *hypotheca*<sup>1</sup> of the *fiscus* or imperial treasury for the payment of taxes, and that of a wife for her *dos*.

#### IMPLIED MORTGAGE

A mortgage might be created either by agreement, or by the operation of law. The latter was called *tacita hypotheca*. For example, in the absence of a contract to the contrary, the owner of a dwelling house had an *hypotheca* as security for rent over all the moveable property belonging to a tenant occupying the house. Similarly, a wife had a lien on the husband's property in respect of her *dos*. Constantine subjected the property of tutors and curators to a *tacita hypotheca* in favour of the pupil or minor.

<sup>1</sup>There were so many drawbacks in later Roman Law of mortgage that it may be said to be in a state of confusion.

## V. THE LAW OF OBLIGATIONS

Obligations are of two kinds :

- (1) Contracts, and
- (2) Delicts or torts.

(1) Law of Contracts. The Roman Law of contracts is the basis of the English Law. To us in India, who are governed by the Indian Contract Act, Roman Law is of value because the Act is based largely on the English Law. Mr. Cuq says that when we study the composition of a Roman household, we find there were certain persons free by birth yet retained in bondage by the head of the family. These were the debtors who had not been able to pay their debts and were called the *obligati*, i.e., the bound ones. From the *obligati* is derived the Roman idea of obligation. Hence obligation may be defined as a bond of law (*vinculum juris*) by which we are compelled to give, to do, or to forbear from doing something.

The essential characteristic of the law of obligations which distinguishes it from the law of property or servitudes is that the law of obligations confers upon the parties only rights *in personam*, while the law of property deals with rights *in rem*.

## CLASSIFICATION OF OBLIGATIONS

Obligations were classified in the following manner :

- (1) With reference to the authority from which they derived their validity, or binding force, as

(a) civil and (b) praetorian ; civil—because they were based on the civil law of Rome and praetorian—because they were introduced by the edicts of the praetors. (2) According to their juristic nature, obligations were classified into (a) *ex contractu*, (b) *quasi ex contractu*, (c) *ex delicto* and (d) *quasi ex delicto*. As an example of the obligation *ex contractu* may be mentioned, a contract of sale or hire, and of *quasi ex contractu*, the obligation to return the money paid to one by mistake. For *ex delicto*, we may take the case of an obligation based on unlawful damage to property, and lastly as regards *quasi ex delicto*, we may mention the vicarious liability imposed by law upon masters for the torts of their servants. (3) Another classification is that into civil as opposed to natural obligation. In the case of the former, it could be enforced by ordinary process either in civil law or by the edicts of the praetors, but a natural obligation is one which could not be enforced by law, for example, a contract between a father and son. This was like the contract of imperfect obligation, which though it could not be enforced in a court of law, yet was not void. Its features were as follows :

(a) It might operate as a good defence, where money had been paid by mistake. Suppose A promised to pay B, his son, 50 *aurei*, B could not enforce the contract, but, if by chance he received the money he acquired a good title to it.

(b) It could be pleaded as a set-off in a suit based on a legal obligation, e.g., if X owed Y 100 *aurei*

under a civil law contract and Y owed X 100 *aurei* under a natural obligation, in a suit by Y, X could successfully plead the natural obligation as a set-off.

(c) It could be made to serve as a good consideration, for instance, for creating a mortgage.

(d) The *peculium* of either a son or a slave could be increased or diminished by means of a natural obligation.

Briefly stated, a natural obligation may be said to be *nudum pactum*, that is an agreement which could not be brought under the classification of contracts recognised by law, one which could not be actively enforced in a court of law, but which, all the same, could be used as a good defence or a set-off.

#### DIVISION OF CONTRACTS

There were four kinds of contracts :

- (1) *Re*, created by delivery of a thing (*res*)
- (2) *Verbis*, made by a set form of words,
- (3) *Litteris*, in writing, and
- (4) *Consensu*, by the consent of the parties.

#### REAL CONTRACTS

The distinguishing feature of a real contract was the creation of an obligation by the mere delivery of a thing (*res*). It was 'real' in the sense that nothing more was needed for its formation than the handing over of a thing, the object of the contract, by the promisee, and the main duty of the promisor was to

return it according to agreement. These contracts like the verbal and literal contracts may be said to correspond to the formal contracts of English Law in the sense that all these three have a formal basis, which might consist, "not in words spoken or written, but in something, some object, whether money or other property, delivered by one party to the other". Real contracts were divisible into (i) nominate, and (ii) innominate.

(i) The nominate real contracts were :

- (a) *Nexum*,
- (b) *Mutuum*, (loan for consumption)
- (c) *Commodatum*, (loan for use)
- (d) *Depositum* (bailment)
- (e) *Pignus*<sup>1</sup>.

(a) *Nexum* (solemn loan). This was the earliest form of real contract. It is said that all real contracts originated from *nexum*. In order to create this obligation the ceremony of *mancipatio* had to be gone through. The borrower was now under an obligation to repay. He is said to be '*nexus*' to his creditor, i.e., he has directly pledged his own person for repayment of the loan, and thus stood in precisely the same position as a judgment debtor. If ultimately the debtor failed to repay the loan, the creditor was free to proceed to execution against the person of the debtor by means of *manus injectio*. It became obsolete owing to *Lex Poetelia* of about B.C. 326.

<sup>1</sup> A pledge or mortgage has two legal aspects—It gives rise to rights in *rem* and in *personam* according as it is regarded as *jura in re aliena* or simply as a contract.

(b) *Mutuum*<sup>1</sup>, was an unilateral or loan for consumption of articles that perished in the use, such as money, wheat, etc. The essence of this contract was, firstly, there was no consideration for the loan, and secondly, the borrower was not under an obligation to return the very thing lent to him, but only an equivalent of the same sort both in quality and quantity. The borrower became the actual owner of the thing, and if after the contract was concluded, it was destroyed by accident, the borrower was bound to make good the loss to the lender. As this contract was without consideration, the latter could not charge interest, unless there was a separate agreement by a verbal contract (*stipulatio*.) Under *mutuum* the borrower was only liable to repay the exact amount he borrowed, not more nor less. "In all probability *mutuum* first became actionable, not because it was recognised specifically as a contract worthy of enforcement, but by reason of the recognition of a general principle that if A were enriched at the expense of B without any justification, then B should have an action to recover the amount of the enrichment".

In the emperor Vespasian's time, the S.C. *Macedonianum* (A.D. 69-79) was enacted on the grounds of public policy by which no person under the *patria potestas* of a *paterfamilias* was, liable for money lent to him, unless it was given for procuring necessaries. The effect of this enactment was, not that such loans were void, but that they could not be enforced. The

<sup>1</sup> This is the only *stricti juris* contract in this group.

object of this rule was to restrain the *filiusfamilias* from borrowing money in the hope of inheriting property from his father and being afterwards tempted to murder him on account of the pressure of his creditors. This statute, however, had no application in certain exceptional cases.

(c) *Commodatum* or a loan for use. The characteristics of this contract were:

- (1) It was a gratuitous loan for some specified use, for example, the loan of a cot for a specific period. In this transaction the lender derived no material benefit from it. If he received remuneration, the contract would not be a *Commodatum* but letting and hiring (*conductio*).
- (2) The thing lent should be moveable, not immovable property. If it was the latter, it would be *usus* and not *commodatum*.
- (3) The borrower did not acquire ownership of the article, as in *mutuum*, but only bare custody. Therefore, if after this contract is concluded, the thing lent was lost by accident, the loss fell on the lender, for the principle was that where no one was at fault the loss fell upon the owner. The borrower or *commodatarius*, however, was bound to show the care of a prudent man of business so long as it was in his custody.

- (4) He was bound to return the very article lent to him along with its accretions.
- (5) He could use the thing only for the purpose for which he borrowed it. If he violated this rule, he committed theft or *furtum usus*. For example, if he borrowed Y's horse for riding, he must not use it for drawing a vehicle.
- (6) The borrower, on the other hand, could recover from the lender any extraordinary expenses incurred by him in preserving the property.
- (7) He could also recover compensation, if through the lender's wilful wrong or gross negligence he suffered loss.
- (8) Similarly, he could claim damages if he were prevented from using the article.
- (9) This contract, though it was originally unilateral, became bilateral in course of time by the innovations of the praetors.

(d) *Depositum*. This contract was one of bailment, as when one person entrusted another with some property for safe custody. The incidents of this contract were :

- (1) It was gratuitous as no consideration passed between the parties. But, if the bailee was paid for his services, it would not be *depositum*, but some other contract.
- (2) The bailee was bound to return the very article deposited together with all its

fruits and accessories whenever asked to do so.

- (3) The bailee could not make use of the thing left in his custody; otherwise he would be liable for theft or *furtum usus*.
- (4) The bailee need not show even such care as he usually did in the management of his own affairs. Therefore, he was not liable even for simple negligence, but only for gross negligence or wilful default.
- (5) The bailor, on the other hand, would be liable, if knowingly he left things with latent defects in them as a result of which the bailee suffered loss.
- (6) The bailor must also pay all necessary expenses incurred by the bailee in respect of the thing entrusted to him.

There were there exceptional cases of *Depositum*:

(i) *Depositum miserabile*. This was a case where a person left something with another under exceptional circumstances, for example, shipwreck, or fire, or earthquake. Here, if the bailee refused to return the article, he had to pay to the bailor double its value.

(ii) *Depositum sequestre*. This was a deposit where two or more persons agreed to leave some moveable or immoveable property with a third party pending the decision of a judge as to its ownership, and the arrangement was that he should hand it over to that party who had been adjudged as its owner by the judge. In this kind of deposit, unlike

an ordinary deposit, the bailee had juristic possession, the object being to prevent *usucapio* running in favour of one of the litigants pending the decision of the court.

(iii) *Depositum irregulare*. This usually occurred in the case of deposit of money in a bank. In Dr. Lee's words, "This contract resembled *mutuum*, but its economic purpose was different, because it was a deposit made with a capitalist, not a loan made by a capitalist, and its legal effect was different. It was *bona fide*; not *stricti juris*. It might give rise to *infamia*. The *Seuatus Consultum Macedonianum* did not apply. Interest might be claimed under a simple pact, or in case of *mora*. It may be remarked that in English and South African Law a deposit with a banker is regarded as a loan".

## (2) INNOMINATE REAL CONTRACTS

Innominate real contracts were contracts which had no specific name to distinguish them, and yet were legally enforceable, provided one of the parties had done all that he had consented to do.

These may be illustrated by the four following classical examples given by the jurist Paulus<sup>1</sup>:

(1) I give something to you in order that you may give something to me, i.e., an exchange or *permutatio*.

<sup>1</sup> A formula attributed to Paulus covers most, but not all, of these cases. "Either I give you that you may give, or I give that you may do, or I do that you may give, or I do that you may do".

(2) I give something to you in order that you may do something for me, e.g., A agrees to give B a horse on the understanding that B should repair A's house.

(3) I do something for you in order that you may give something to me, e.g., A loses some article and offers a reward to the finder. If B finds the article, he can compel the other to fulfil the contract.

(4) I do something for you that you may do something for me, e.g., A has a slave X and B has a slave Y. A agrees to liberate X if B will manumit Y.

In these contracts the person who had fulfilled his part of the agreement could either sue the other party for specific performance by the action *praescriptis verbis*, or could put in a claim for the recovery of possession of the thing from the person in default by the action *condictio causa data causa non secuta*.

### (3) THE VERBAL CONTRACTS<sup>1</sup>

Among verbal contracts there were four kinds of which *stipulatio*<sup>2</sup> is the most important. It may be described as a formal unilateral contract which was concluded orally by a solemn question and answer embodying a set form of words, such as "*spondesne?*" meaning do you promise? followed by the answer

<sup>1</sup>This contract was *stricti juris*, i.e., it was interpreted literally, the liability of the parties being determined exactly by their promises. It was made by words (*verbis*) as the name itself indicates.

<sup>2</sup>The other three were (a) *dotis dictio*, (b) *jurata promissio liberti*, (c) *votum*.

"*spondeo*", I promise, resulting *ipso facto* in an obligation. Under the civil law, it could be entered into only by Roman citizens. Subsequently, under the *Jus Gentium*, other forms of Latin expressions were introduced to enable even non-citizens to conclude this contract. As it was a solemn form that gave this agreement its validity, no consideration was necessary to make it binding. In Dr. Muirhead's words, "At an early time *Dabis-ne?* *Promittis-ne?* *Facies-ne?* etc. were accepted, and could be used by *peregrini*. Question and answer at first had to correspond exactly, but these rules too were relaxed in time, though a nod was not enough. . . . In the classical law a promise of ten things and a promise of five, was good for the smaller amount, but the texts are at variance . . . as there is no *consensus in idem*".

Originally *stipulatio* was concluded orally. It became the practice in course of time to reduce it to writing, and this was the common practice under the Empire. The written record usually concluded with the words, "Lobo questioned. . . . Titus promised," or some such phrase. But it was essential that the parties should have met and formulated their agreement when the contract was concluded in an oral question and answer. Some hold that, in Justinian's time, the oral stipulation may have been practically replaced by a document reducing it to writing which was called *cautio*, and the presumption was that the contract was properly made even though the document did not contain the very words used by

the promisor and the promisee. Further it was presumed, that the parties were present at the time of the transaction, for in this contract, the presence of the parties was quite essential.

In the Imperial period, by a constitution of Leo (A.D. 472), a great latitude was allowed in the words used in concluding this contract. By this enactment any expression of intention was deemed sufficient to create a valid stipulation and the parties were not bound to express themselves in Latin.

The great advantage of *stipulatio* was that every conceivable kind of obligation could be put in the form of a question and answer, simplifying the most complicated transaction. Thus agreements such as loan of money, or sale, or hire, might all be ultimately reduced to the form of a question and answer. In this contract the promisee could enforce his claim, if the terms of the agreement were certain, through a simple process *condictio certi* (otherwise called the short and sharp remedy). In all other cases, by an action called *actio ex stipulatu*. The plaintiff was not obliged to enter into the details of the transaction which gave rise to the action. It was enough if he could prove that the promisor and the promisee met and put their agreement in the requisite form. For example, if X owned 20 *aurei* to Y, and if Z agreed to pay the money on behalf of X, and Y accepted the offer of Z, this agreement may be described as a substitution of one contract for another. The old contract was extinguished and a new one was created in

its place. In other words it was a simple case of novation.

#### INVALID OR VOID STIPULATIONS

A stipulation might be made void, firstly, by nature of the subject matter of the contract, e.g., things sacred, religious, or public, in short, things classified as *res extra commercium* could not be the subject of an agreement, similarly a contract to procure a thing non-existent.

Secondly, it might be made void by reason of some legal incapacity in the party concluding the contract. For instance, deaf or mad persons, and infants could not be made parties to it.

Thirdly, it might be made void if the parties did not agree as to their intentions, when either of the parties was under a mistake as to its terms.

Fourthly, it might be made void on account of the condition attached to it, when impossible or illegal conditions were added, for example, if X said to Y, "Do you promise to pay me 100 *ases* if I touch the sky with my finger?" In like manner, a promise to do an illegal act was void.

Fifthly, it might be made void on account of the time fixed by the promissee for its performance, as a promise to do some thing after one's death.

Sixthly, a person could not contract, as a rule, for another. To illustrate, X could not bargain with Y that Z, a stranger, should confer some benefit on Y.

Lastly, it might be not actionable by reason of the persons between whom it was made, for instance, father and son. This would give rise only to a natural obligation.

#### ABSOLUTE AND CONDITIONAL STIPULATIONS

A stipulation was said to be absolute or simple when no condition was attached to it and the promisor was bound by it immediately. Thus a question like "Do you promise to sell me your house?" followed by an answer "I promise" gave rise to a legal obligation which could be enforced immediately. Whereas in a conditional stipulation, a question "Do you promise to sell me your house a week from this date?" followed by an affirmative answer, although it gave rise to a legal obligation could not be enforced at once but only after the lapse of seven days. The case of a stipulation which partook of the nature of a bet, for instance, "If the ship shall have come from Asia, do you promise to give to-day?" is an example of preposterous stipulation or *stipulatio praepostera*, and was invalid because it contemplated performance of a conditional promise before the condition took place. Justinian, however gave it general validity. Again a conditional stipulation may take the following form : X may stipulate with Y. "Do you promise to go to Florence?" and Y may reply "I promise" and X may say "In case you do not go, do you promise to give me 100 *aurei* as a penalty?"

And Y may say "I promise". This contract had the double advantage of fixing a sum as penalty or liquidated damages so that the plaintiff was not obliged to prove, in the case of its breach, anything beyond the fact that Y promised to pay him 100 *aurei*. Further it enabled the plaintiff to enforce his claim by means of the action *condictio certi* instead of *ex stipulatu*, because here the amount was already fixed and was certain.

#### STIPULATION FOR PAYMENT OF INTEREST

In transactions of loans of money, such as *mutuum*, a mere informal promise to pay interest would not create a legal obligation. It should be expressed in the form of a *stipulatio*. The action to sue for interest was based on the verbal contract by the action *condictio certi*, if interest was certain, and *ex stipulatu*, if uncertain. It was the custom of the Romans to calculate interest by the month, at half or one per cent per month. The rule was that interest should not exceed a certain limit, and under the Twelve Tables, the maximum amount of interest that could be charged should not exceed one twelfth of the capital. Towards the close of the Republic, the maximum was fixed at twelve per cent per annum. Justinian made a law that interest should not exceed more than six per cent per annum, and that stipulation to pay compound interest was void.

## CLASSES OF STIPULATIONS

There were four kinds of stipulations :

1. Judicial ;
2. Praetorian ;
3. Common ; and
4. Conventional.

1. A judicial stipulation was one made under compulsion by the order of a judge. In a suit against a person who was harbouring a runaway slave, the judge might direct the defendant to enter into an agreement that he would either hand over the slave to the plaintiff, or pay him his value. It was made as a security against fraud.

2. A praetorian stipulation was one concluded at the instance of a praetor, e.g., in a suit by a legatee against an heir, the praetor might direct the latter to furnish security in respect of the legacy left to him by a testator, for instance, a conditional legacy that an article should be given to a person on his attaining eighteen years.

3. A common stipulation was one which originated either by the order of a praetor or judge, e.g., a contract entered into by a tutor as to the security of the pupil's property in his charge.

These three kinds of covenants had one characteristic feature common to them. They were made under compulsion and not by the free consent of the parties. They were like the recognisance of the English law, like the furnishing of bail or security in respect of

a person apprehended or held in custody. Therefore these stipulations could not be classed as contracts in the real sense of the term, for they were not formed by voluntary agreement, but by the order of a court of law.

4. Conventional stipulations, made by the agreement of the parties, were a real type of contract, as they were made by the free will of the parties, e.g., contracts of sale or hire.

#### CONTRACT OF SURETYSHIP

This contract was mainly created by *stipulatio* in cases where one person promised to be answerable for the debt of another. If it was created by a mere informal promise, it would not be legally obligatory. Therefore, it should be in the form of a stipulation, the surety undertaking by an express promise to pay, if the principal debtor failed to pay. As soon as it was concluded the effect was to make the surety an accessory, or to be more precise, a *correal* debtor.<sup>1</sup>

During the Republic there were two forms of suretyship.

- (1) *Sponsio*
- (2) *Fidepromissio*

#### *Sponsio*

Its chief incidents were :

First, *Sponsio* existed from the earliest period of Roman history.

<sup>1</sup> He was also known as *adpromissor* with the principal debtor, i.e., the surety became liable to pay the debt, if the principal debtor made default.

Second, it could be created only by means of *stipulatio* and by the words "spondesne ? spondeo".

Third, it was applicable only if the parties were Roman citizens.

Fourth, it arose only where the principal contract was itself created by *stipulatio*.

Fifth, in *sponsio* only the surety was liable and not his heir.

Sixth, in respect of this contract the following statutes were of importance :

- (a) The *Lex Publitlia* (date uncertain) laid down that a surety who was obliged to pay the debt could recover from the principal debtor twice the amount of the debt if he failed to repay him within six months.
- (b) The *lex Apuleia* (about B.C. 200) enacted that if there were several sureties, any one of them, who had paid more than a proportionate share of the debt, might recover the excess from his co-sureties.
- (c) The *lex Furia* (a little later than *lex Apuleia*) made two years the period of limitation as to the liability of sureties, further it provided that, if there were two or more sureties, each should be liable proportionately to the extent of his own share.

- (d) Under the *lex Cicerea* (date unknown) a creditor was bound to inform a person, who offered himself as a surety, of the sum of money due to him by the principal debtor, and the number of sponsors who had already given an undertaking. If not, the sureties were discharged from their liability.
- (e) By the *lex Cornelia* (B.C. 81), it became the rule that no one should be a surety, in the same year to the same creditor, in respect of the same debt, for a sum exceeding 20,000 *sesterces*<sup>1</sup>.

### *Fidepromissio*

*Fidepromissio* was another form of suretyship which, like *sponsio*, was prevalent during the republic and classical times, but became obsolete in Justinian's reign. Both were similar in all respects except in the following two particulars :

- (1) *Fidepromissio* was open to aliens as well as to Roman citizens, while *sponsio* was confined only to Roman citizens.
- (2) *Fidepromissio* was formed by the words "*fidepromittisne? fidepromitto*", while *sponsio* by "*spondesne? spondeo*".

<sup>1</sup> *Sesterce*—in the time of Augustus, a small silver coin of the value of two and a half farthings. It was the Roman unit in matters of account, something like the English pound or the Indian rupee.

*Fidejussio*

The chief characteristics of *fidejussio* were :

First, it was a form of stipulation which came into existence towards the end of the Republic. The two earlier forms of suretyship, gradually became extinct, so that in Justinian's time, this was the only form which prevailed.

Second, it was created by the words "*Fidejubesne?*  
*Fidejubeo.*"

Third, it could be used both by citizens and non-citizens, like *fidepromissio*.

Fourth, it could be made both in respect of civil as well as natural obligations and further, in *fidejussio*, the original contract need not be formed by *stipulatio*. This is one point of difference between *fidejussio*, and *sponsio* and *fidepromissio*.

Fifth, the sureties and their heirs were bound.

Sixth, each surety was bound to pay the whole amount guaranteed by him. But this was found to be inequitable, and it was subsequently altered by a rule called *beneficium divisionis* of Hadrian. It provided that when there was more than one surety, the one sued by the creditor could plead that his liability should be proportionately divided among all the sureties. Before this rule, there was no right of contribution between co-sureties.

Seventh, there was no rule limiting the period of liability of sureties.

Eighth, a surety could urge that the creditor should convey to the former all the remedies, which the latter had against the principal debtor when the surety had discharged the debt, thus enabling him to be placed as far as possible in the position of original creditor in respect of the loan. This right was technically called *beneficium cedendarum*<sup>1</sup> *actionum*, i.e., an action which helped the surety to realise his money.

In Justinian's<sup>2</sup> time, a rule was introduced called the *beneficium ordinis*, by which the surety who was sued by a creditor might plead that the latter should first proceed against the principal debtor before proceeding against him.

#### WOMEN AS SURETIES

The contract of suretyship was a species of *intercessio*, i.e., an obligation incurred on behalf of a third party. By the S. C. *Velleianum* (A.D. 46), women were prohibited from becoming sureties. But to this rule there were certain exceptions, namely :

- (1) where a woman was guilty of fraud.
- (2) where she became a surety in order to provide a dowry for her daughter.

<sup>1</sup> *Cedendarum*—realisation, fulfilment.

<sup>2</sup> Before Justinian, the creditor could proceed against a surety first.

- (3) where the creditor was a minor and the principal debtor insolvent, or where it was for her benefit, or she had deceived the creditor, or to save her father from consequences of a judgment.

In Justinian's reign, these rules remained unchanged, except that the Emperor decreed that in the case of a contract of suretyship with a woman it should be in writing and executed in the presence of three witnesses. If not, it was void. But he enacted that no agreement by a wife in favour of her husband should be valid even though it was properly executed by her.

#### CORREAL OBLIGATION

It is best described by an example. If A owed B ten *aurei*, B, the principal creditor might associate another person C with him as an accessory creditor who might stipulate with the debtor A for the payment of the money to him. C would thus become a second creditor,<sup>1</sup> i.e., a correal creditor, jointly with the principal creditor B. C would thus be entitled to all the rights under the contract. The position of the *correal* creditor was that of an agent or a trustee and he was bound to exercise all the benefits under the contract in favour of the principal creditor. His rights perished with his death, and being purely personal to himself, they could not be acquired by

<sup>1</sup> He is also called *adstipulator*.

his *paterfamilias*. Again, a slave could not be a creditor in a *correal* obligation.

This was very common in the commercial dealings of the Romans. It was employed chiefly in creating contracts of agency, so that, in case the principal creditor was for some reason or other unable to enforce the contract, it could be done by the other creditor. Before Justinian, it was also made use of to evade the rule by which no stipulation which was to be executed after the death of the promissee was valid.

If on the other hand a debtor associated another person with himself who made the same promise as the principal debtor, such third person was called an *adpromissor*. The chief example of *adpromissio* is *fidejussio*. This was a case of passive, as *adstipulatio* was of active, *correal* obligation. That is to say, it was said to be active when it was to be enforced by a creditor, and passive if it was in respect of a debtor.

#### SOLIDARY OBLIGATION

It may be illustrated by the following example: X, Y and Z jointly broke A's glass windows. Here the joint commission of the *delict* gave rise to a separate liability on the part of each one of them to make good the loss to A who might sue them either jointly or severally, and in case any one of them adequately compensated for the damage, the matter was at an end, and A could not recover damages over

again from the others. The liability incurred by X, Y or Z was known as a *solidary* obligation. It may be said to give rise to a plurality of obligations in respect of one and the same cause of action. In the example given above, if A was not able to recover against X, he could still proceed against Y and so on. Hence its extinction could be brought about, as against all the parties concerned, only by satisfying the creditor in a material way. A correal obligation on the other hand gave rise only to a single cause of action. If, for example, A and B were co-creditors as regards a debt due by C, either A or B could sue for the whole debt, but if once A has sued C, no further action could be taken in respect of the same cause of action by B. As this contract was one and indivisible, once the debtor was discharged, his liability became extinct once and for ever. If any further action was taken against him on the same cause of action, he could successfully plead *res judicata*, i.e., a principle of law which disabled a plaintiff from launching against a defendant a multiplicity of suits in respect of the same cause of action.

As to the difference between the two, the better view seems to be that there is no substantial ground for this distinction made by writers like Mr. Poste and Dr. Moyle. It is said that the Roman lawyers themselves did not make any such division, and secondly, the critics allege that, even in *fidejussio* the obligations of the several sureties were distinct, for they could be made at different times, and also one

surety could make a conditional, while another an unconditional one.

#### (4) THE CONTRACT *LITERIS*

The Contract *literis* or literal contract was made by a fictitious entry in a ledger with the consent of the promisor. For example, if A, a *paterfamilias*, had an account with his grocer B, there might be a series of transactions between them. If, on a periodical settlement of accounts, A found that B owed him 20 *aurei*, he might, to simplify accounts, enter this amount in the debit column of his ledger with the consent of B, as if the money had been paid to B on that day. Thus an entry in an account book was enough by itself to create a legal obligation. But, if money had been actually paid on that day by A to B, it would not give rise to a literal contract. It would then be a case of a real contract, and an entry in the account book would only serve as evidence of the real contract. Hence, during the republican and classical times, the essence of a literal contract was that the entry of payment alleged to have been made, should be a false entry, made in the account book of the creditor with the consent of the debtor. It was false in the sense that no money was actually paid at the time of the contract.

The main points of difference between a verbal contract, *stipulatio*, and a literal contract were (1) that while the former was in the form of a question and

answer, the latter was formed by an entry in an account book.

In a literal contract, the parties need not be present at the time of the agreement, but in *stipulatio* their presence was absolutely essential.

The points of comparison were :

- (i) In both, no consideration need pass between the parties.
- (ii) Both were *stricti juris* i.e., they were strictly interpreted and enforced, as opposed to contracts, *bonae fidei*, in which equitable considerations were taken into account.
- (iii) Both could be enforced by the remedy *condictio certi*.

Literal Contracts became practically obsolete by the classical times, about the 3rd century A. D. In the words of Prof. Jolowicz, "How old the institution is we cannot say ; book-keeping with entries of loans and repayments certainly existed at the beginning of the second century B.C., but this does not necessarily mean that fictitious entries were already known. In Cicero's day, on the other hand, they were clearly in common use, and by the classical era the institution had already become practically obsolete".

By Justinian's time, the literal contract had become extinct. Its place was taken by *cautiones* i.e., written agreements between the parties by which the debtor promised to pay a certain sum of money to the creditor which resulted in a legal obligation on the part of the promisor. They were something like

informal promissory notes of modern times, and gave rise to a presumption that the money promised to be paid was really due to the creditor, which could be rebutted if the defendant could prove, within two years from the date of the contract, that in fact he received no consideration. Justinian enacted that a person falsely denying his written acknowledgement of debt should be held liable to pay double the amount. It will thus be seen that the so-called literal contract of Justinian was quite different from the contract *literis*, properly so called.

#### (5) THE CONSENSUAL CONTRACTS

They were formed by the consent of the parties. Their validity depended not on any particular form required by law, (as in *stipulatio* or contract *literis*), but on each party furnishing consideration called *Causa*. These contracts resembled the real contracts in the following particulars :

- (i) Both were informal ;
- (ii) Both were derived from the *Jus Gentium* (except *Mutuum*) ;
- (iii) Both were contracts, *bonae fidei*, and not *stricti juris* (excepting *Mutuum*<sup>1</sup>). Hence they were not interpreted literally but equitable considerations were taken into account in enforcing them ;

<sup>1</sup> *Mutuum* was a contract *stricti juris*.

(iv) In both it was not necessary that the parties should be present at the time of the transaction.

There were four consensual contracts<sup>1</sup>:

- (a) Sale (*emptio*<sup>2</sup> *venditio*<sup>3</sup>)
- (b) Hire (*locatio*<sup>4</sup> *conductio*<sup>5</sup>)
- (c) Partnership (*societas*) and
- (d) Agency (*mandatum*)

#### (a) SALE

Sale may be briefly defined as a contract for the transfer of property for a price by one person to another.

It was formed by agreement between the parties as to the thing to be sold and the price to be paid. Therefore the three elements in this contract were:

- (1) Consent, (2) Thing, (3) Price.

The payment of a price was essential. It was this that distinguished sale from exchange. To complete a contract of sale no other formality was required. It became binding as soon as the parties agreed as to the subject of the contract and the price,

<sup>1</sup> Dr. Moyle says that the *Jus Gentium* is the source of almost all contracts. What he means is that the consensual and real contracts - except *mutuum*, were derived from the *jus gentium*. Verbal and literal contracts, which were derived from the *jus civile*, had practically lost all their importance in Justinian's time so that the only contracts that survived in his day were those which were mainly derived from the *jus gentium*.

<sup>2</sup> Purchase.

<sup>3</sup> Sale.

<sup>4</sup> Letting.

<sup>5</sup> Hiring.

which must consist of money. Further, it must be real and not nominal. If it was sold for a nominal price, there was no sale. But mere inadequacy of price did not vitiate the contract, unless it fell short of half its value, in which case under a constitution credited to Diocletian (but which actually appears to have been enacted by Justinian), the vendor could refuse to carry out the contract. This was called the rule as to *laesio enormis*.<sup>1</sup> But if the price were twice as much as the value, it was doubtful whether the buyer had a similar remedy to cancel the contract.

All risks connected with the property, arising subsequent to the agreement and the fixing of the price, fell on the buyer, except in the following cases, where the risk was on the seller.

(a) Sale of *res fungibles* until the quantity to be sold was definitely ascertained, e.g., if you buy fifty sacks of rice from the stock in my godown, and specific sacks have not yet been allotted to the contract, then the risk falls on me if the rice is destroyed.

(b) Conditional sales—if the article to be sold was destroyed or lost before the fulfilment of the condition.

(c) Where the *vendor* failed to deliver the article on the due date, the liability then also fell on the seller.

(d) where the *vendor* gave to the buyer a choice of two things, and one was destroyed, then

<sup>1</sup> i.e., more than ordinary prejudice".

the loss fell on the seller. If both were lost, the loss fell on the buyer.

The exceptions mentioned above would hold good in the absence of a contract to the contrary. Again, just as the buyer, as a rule, was responsible for all losses after the agreement was concluded, so all the accretions to the property would go to the buyer's benefit.<sup>1</sup> Although the contract was complete as soon as the parties were agreed as to the article to be sold and the price, yet the buyer did not become owner until he paid its price, unless it had been sold on credit, or the buyer had taken its delivery after furnishing some security for the price. This rule was applicable, even though it was delivered to the purchaser before payment of the price, for delivery by itself would not give rise to the presumption that the ownership was transferred to the buyer. This principle was of practical importance. Before payment of the price the right of the purchaser was only a right *in personam*,<sup>2</sup> enforceable only against the seller. But if it was paid, he would become the owner and would acquire a right *in rem* over it.

To this may be added the rule that writing was not essential to the validity of a contract, but in

<sup>1</sup> Supposing a slave woman was the subject of sale, any child born to her subsequent to the contract would belong to the buyer.

<sup>2</sup> If, for example, A agreed to sell his house to B for 500 *aurei*, this would be a valid contract between A and B. B could become owner only after the payment of the price. If before B paid the money, A sold it away to C for 600 *aurei*, the remedy open to B was only a right to sue A for damages for the breach of contract, i.e., an action *in personam*. But if on the other hand B paid the money and had become owner of the house before A sold it to C, the right of B would be a right *in rem*, and as such he could enforce his rights against C and get the house conveyed to him.

Justinian's time, if the parties intended to reduce their contract to writing and if the agreement was that there should be no contract until they had done so, it was not complete and either party could withdraw before it was written out. It was essential that the parties should sign the deed, in case it was not written by them. If it was drawn by a notary, it was not complete until it had been certified by him and the parties had approved of the document.

#### EARNEST MONEY (ARRA)

The payment of earnest money was not essential to the formation of a contract of sale. At best it served only as evidence of it. Hence a person who paid it was not released from the contract by merely foregoing the earnest money. Justinian, however, laid down that it should be forfeited by the person who furnished it in case he wished to be absolved from the contract, and that it should be made the measure of damages to be paid by the party in default. The person who promised to purchase and made default lost his earnest money but at the same time was released from the contract, and in the case of the other party, he had not only to return the earnest money but he had to pay as penalty an equivalent amount to the purchaser.

#### WARRANTY OF QUALITY

In every contract of sale, there was an implied warranty of quality as to the thing sold. It was as to

latent defects in the thing, that is, defects discovered subsequently and which could not have been found out at the time of sale. Originally, this warranty existed only in the case of fraud or express misrepresentation. But later the *curule aediles*<sup>1</sup> one of whose duties was to superintend the markets, enacted rules regulating the sale of slaves, animals, moveables and immoveable property. As to the sale of slaves, the purchaser could rescind the contract by an action called the *actio redhibitoria*<sup>2</sup> within six months of sale, if he could prove that the slave was diseased or given to some vice, of which defect the purchaser had no knowledge. He could proceed against the seller by another action called *actio quanto minoris* which could be brought within a year of the contract, whereby he could keep the slave but recover damages from the owner, similarly, with animals, etc. The fact that the seller himself was ignorant of the defect did not exonerate him from liability. If on the other hand he was aware of it, the matter was so much the worse for him, he was guilty of fraud (*dolus*) and liable for any damage accruing to the buyer.

#### WARRANTY OF TITLE

In every contract of sale there was an implied warranty that the buyer would be left in undisturbed

<sup>1</sup> They were called "curule aediles" because, like the other higher magistrates, they sat in a chair of state (*sella curulis*).

<sup>2</sup> *Redhibitoria* from *redhibeo*—to give back, return a damaged article.

possession of the property. If the purchaser was subsequently dispossessed, he could claim damage from the seller. But, it will be observed, there was no implied warranty as in English Law, that the seller was conveying ownership to the buyer. At the time of the XII Tables, an action for double the price on the sale of *res mancipi* lay against the seller, if he failed to defend the buyer against any one claiming by a superior title within the period of limitation. As to *res nec mancipi*, it was customary to stipulate for the same protection, if the value of the thing was considerable. But, if small, stipulation for the actual loss incurred was given instead. At a later period, the buyer could *ipso facto* claim such protection, so that as time went on one or the other of these stipulations came to be implied in the contract itself. Ultimately the rule was that the purchaser was entitled to an indemnity for the loss of the article through a defect in title.

The duties of the seller may be summed up as follows:

(1) Before delivery he must take as much care in the custody of it as a *bonus paterfamilias* would in the management of his property. In other words, he must show *exacta diligentia*. But if the buyer made undue delay in taking delivery, the seller was then responsible only for wilful misconduct or gross negligence.

(2) The seller must: (a) deliver exclusive possession of the article sold on payment of the price.  
(b) guarantee against eviction.

(c) warrant against undisclosed defects.

The duties of the purchaser were :

(1) He must pay the purchase money. In case he delayed payment, he must pay interest. The contract of sale being a *bona fide* one, it was considered equitable that the purchaser should pay interest if he failed to pay the price on the due date.

(2) He must take delivery from the seller according to the agreement.

The points of difference between the Roman and English law of sale are (1) The rule in English Law is "*caveat emptor*"<sup>1</sup>, i.e., purchaser beware. In England, if both the purchaser and seller were unaware of any defect in the thing sold, the loss fell on the buyer, but in Rome the rule was exactly the reverse, it fell on the seller.

(3) In England, under the Statute of Frauds, no contract for the sale of goods for the price of £10 or upwards is valid, unless the buyer accepts a portion of the goods sold to him and in fact receives delivery of them or pays some money as earnest to show that he means business, or makes a note or memorandum in writing signed by both parties to the contract. There is no such rule in Roman Law.

(4) In English Law the property in specific goods passes to the buyer as soon as the contract is concluded and before delivery, not so in Roman Law.

(5) Further, in English Law, there is no rule corresponding to *laesio enormis* of Roman Law.

<sup>1</sup> *Emptor*—purchaser; *caveat*—let him beware.

(6) In English Law, a sale of stolen goods in 'market overt' gives the buyer a good title, until the time the thief is convicted by a prosecution launched by the owner. There is nothing corresponding to this rule in Roman Law.

(b) HIRE

The contract of hire may be defined as a "contract, whereby one person agrees to give to another the use or the use and enjoyment of a thing or his services or his labour in return for remuneration, usually in money".

There were three forms of this contract:

- (1) *Locatio conductio rei*<sup>1</sup>
- (2) *Locatio conductio operarum*<sup>2</sup>
- (3) *Locatio conductio operis*<sup>3</sup>

(1) *Locatio conductio rei* consisted of hire of anything moveable or immoveable, and not consumed in the use, for money payment. As in a contract of sale, it was essential that the parties should agree as to the object to be hired and the money to be paid. The man who let the thing on hire was called the *locator* and the person who took it was called the *conductor*. It was concluded as soon as the price was settled. It was necessary that the hire should consist of money. Otherwise, it might be either *commodatum* or an in-nominate contract. The action that might be taken

<sup>1</sup> Hire of things.

<sup>2</sup> Hire of menial services.

<sup>3</sup> Hire for particular work.

in respect of this contract was called *actio locati*, if taken by the *locator*, or *actio conducti*, by the *conductor*.

The duties of the *locator rei* were (1) to deliver the article hired to the *conductor* (2) ; to guarantee against dispossession for the period agreed upon ; (3) to see that it was fit for the purpose for which it was let ; (4) to keep it in good repair ; (5) to allow the *conductor* to remove fixtures, if any, without doing damage to his property. The duties of the *conductor* were : (1) to take as much care of the property as a *bonus paterfamilias* would do in the management of his affairs ; (2) to pay the rent regularly ; and (3) to hand the property over to the owner on the expiry of the term.

The difference between a contract of sale and that of hire was that whereas in sale the risk or loss fell on the buyer as soon as the contract was concluded and before delivery, in hire the risk in such cases was borne by the person letting, and not by the *conductor*.

(2) *Locatio conductio operarum*. This contract arose in cases where a person gave his services to another in return for wages paid to him. Its peculiarity was that it could be only in respect of ordinary unskilled labour. A man could be engaged to hew wood and draw water under this contract. It could not be concluded with reference to skilled professional men, such as lawyers, doctors, engineers, etc. "Not all services could be the subject of a contract of hire. It was generally limited to services which were commonly

rendered by slaves. Members of what are called the liberal professions were supposed to do their work for nothing. But they could recover an honorarium for their services by means of the *extraordinaria cognitio* of the magistrates".

(3) *Locatio conductio operis* occurred in cases where one person supplied the material and the other the labour for the making of an article, e.g., A contracts with B to make some furniture out of the wood supplied by him.

In all these three cases of hire each party was bound to show *exacta diligentia* with reference to the thing in his custody. The contracts, *locatio conductio operarum* and *operis*, might be terminated by death. Only in the case of *locatio conductio rei*<sup>1</sup> death did not put an end to the agreement.

#### (c) PARTNERSHIP

Partnership may be defined as a contract by which two or more persons agree to combine property or

<sup>1</sup> *Locatio conductio*: There were some classes of cases, where the contract of sale and hire were similar, and it was doubtful to which class they belonged. The following were some of them :

- i. *Emphyteusis*. It was considered by some, sale, and by others, hire. But under a constitution of Zeno it was regarded as a separate type by itself.
- ii. In cases where slaves were hired as gladiators on condition that a certain sum of money should be paid for each of those who survived and a larger amount for each one of those killed in the arena, the surviving slaves were considered as hired, and those slain as sold.
- iii. If a goldsmith made a ring out of the gold supplied by his customer, then it was a case of hire. But, if the workman supplied the gold himself, then it would be a case of sale.

labour or both for the purpose of gain, or for their common benefit.

There were five kinds of partnership :

(1) Universal partnership (*societas universorum<sup>1</sup> bonorum<sup>2</sup>*) extending to all the estate of the partners, i.e., property of every description. This excluded the possibility of any partner owning private property, for the contract was that all the estate of the partners previously owned by them individually or which they might get during the partnership was to be owned as common property of all and the partners had the right to have all their debts and expenses met out of the common stock. This was the name given to the relation between *sui heredes* holding together after the death of the *paterfamilias*. But in later times universal partnership did not exist except by agreement.

(2) Trade partnership, i.e., partnership confined to all trade transactions (*societas universorum quae quaestu<sup>3</sup> veniunt*).

(3) Partnership restricted to a particular business (*Societas alicujus negotiationis*)<sup>4</sup>.

(4) Partnership for farming revenues (*societas vectigalium*)<sup>5</sup>.

(5) Partnership to own a thing jointly (*societas unius<sup>6</sup> rei<sup>7</sup>*). This is not a partnership in the proper

<sup>1</sup> *Universus*—all things in entirety and in detail.

<sup>2</sup> From *bonum*—good.

<sup>3</sup> That which is gained.'

<sup>4</sup> *Negotiatio* meaning wholesale business, extensive trade.

<sup>5</sup> *Vectigal* means revenue.

<sup>6</sup> *Unius*—one.

<sup>7</sup> *Rei*—thing.

sense of the term, for it is hardly distinguishable from co-ownership. It was considered under that class because where joint ownership was based on agreement between two persons (but not in cases like inheritance or legacy) they could sue for accounts as between them by the *actio pro socio*.

#### RIGHTS AND LIABILITIES OF PARTNERS

(1) Profit and loss should be equally divided between the parties. There could however, be an agreement by which one partner received a larger share of the profits than of the losses. In some cases, even a contract that a partner might be absolutely exempt from all losses was valid, for the services, experience, and skill of a partner might be so important to the joint enterprise as to entitle him to a better position than the others. But, conversely, an agreement that one partner should always bear the losses and never share in the profits was void. Such a partnership was called *leonina*<sup>1</sup> *societas*. In the words of a learned writer "an arrangement by which one party should have *all* the gain was not recognized as binding; it was considered as contrary to the nature and purposes of the *societas*, the aim of which was gain for all the parties concerned. Such an arrangement the lawyers called *societas leonina*, a partnership like that which the lion in the fable imposed upon the cow, the sheep, and the she-goat, his associates in the chase".

<sup>1</sup> *Leonina*—of or relating to a lion.

(2) The partners were bound by the terms of an express agreement, if any.

(3) Each partner had to contribute his share of the capital or perform services according to agreement.

(4) Each should account to the other partners for all profits made in the course of the partnership business.

(5) Each should show good faith to the others and ordinary diligence in the conduct of the partnership business. That is to say, he must observe the same diligence in the affairs of the partnership as he did in his own affairs. "This was decided on a ground that would equally apply to all contracts whatever—that a man who takes to himself a partner lacking in diligence has nobody to complain of but himself". Further each partner was made liable only for fraud or wilful default, and not for ordinary negligence.

(6) Each could claim to be re-imburshed from the other for all expenses and liabilities properly incurred in the management of the partnership.

#### DISSOLUTION OF PARTNERSHIP

(1) *Bona fide* renunciation : i.e., if one or more partners expressed a desire to terminate the partnership. But, if this was done with a fraudulent purpose in order to obtain some personal gain, the profit so obtained would have to be shared with the others. For example, if a partner in a universal partnership

renounced, anticipating an inheritance coming to him with the idea of keeping it to himself, he was compelled to share it with the other partners if it was profitable, but if it ended in loss, it had to be borne by himself. In Dr. Lee's words, "As Cassius puts it, he freed his partners from himself, but not himself from his partners".

(2) Death. As a rule the death of even one partner dissolved the partnership. The only exception was in the case of a *societas vectigalium*.

(3) Where the object for which the partnership was formed was accomplished.

(4) In case all the property of a partner was confiscated by the State.

(5) If any of the partners suffered loss of legal status, for example, *capitis deminutio maxima* or *media* (not *minima*). In Justinian's time only *capitis deminutio maxima* (which meant forfeiture of goods) had the effect of dissolving the partnership.

(6) The insolvency of a partner.

(7) By efflux of time, if limited to a particular period.

The points of difference between Roman and English Law of partnership are as follows:

(1) In English and Indian Law each partner so far as he incurred liabilities within the scope of the partnership business is an implied agent of the other partners, and the contract entered into by him would bind all the other partners. In Roman Law on the other hand the rule was different. Here, the law of

partnership was confined to regulating the claims of partners *inter se*, and third parties who might have entered into contracts with a partner in respect of the partnership could look only to the particular individual with whom they had dealings, and could neither bind the other partners nor the assets of the business by the transaction.

(2) In English Law the object of constituting a partnership must be to make profit, but in Roman Law such an object was not essential.

(3) In English Law, death dissolves the partnership, in the absence of a contract to the contrary. In Roman Law on the other hand death dissolved the partnership in all cases even though the parties had agreed *ab initio* that it should continue.

#### (d) AGENCY

The contract of agency was formed when the agent or *mandatarius* agreed to do something for the principal or *mandator* without reward. It may be defined as "a contract whereby one person (mandator) gives another (mandatarius) a commission to do something for him without reward, and the other accepts the commission".

Its essential features were:

(1) It should be gratuitous. This was the only kind of consensual contract which was gratuitous. All others were for consideration. If the agent was paid money or some reward for his services, the transaction

would not be agency, but *locatio conductio*, i.e., a contract of hire, or it might be an innominate contract, if the money to be paid to the agent was not settled;

(2) It should be with reference to some future act;

(3) It should not be concluded in respect of an illegal or immoral purpose, e.g., if A agreed to give a good thrashing to B on the request of C—it would not be a contract of agency.

(4) It required no special form. It could be made subject to a condition.

(5) It was concluded as soon as the parties were agreed as to the work to be done. But the agent might repudiate the agreement soon after, provided he gave notice of his intention to the principal as soon as possible before any loss occurred to the latter by the agent's non-performance of the act agreed upon. If the agent made undue delay in communicating this information, he might be liable to be sued by the principal by the *actio mandati*, unless the agent had some good legal excuse, for instance, where the agent unexpectedly became seriously ill.

(6) A contract of agency merely to benefit the agent could not create any legal obligation between the parties. Supposing a person acted on the advice of some friend with reference to some matter concerning himself and as a consequence suffered loss, he could not treat this transaction as a contract of agency<sup>1</sup>.

<sup>1</sup> In other words the principal must be benefited by the act of the agent,

To quote Dr. Lee, "I may give a mandate in the interest of (a) myself alone . . .; (b) myself and you . . .; (c) myself and a third party . . .;

(7) A contract of agency for the benefit of the agent and a third person was known by a special name *mandatum qualificatum*, for example, where a person was requested to lend money on interest to a third party. This was in fact a kind of suretyship, the presumption being that if a man requested a person to lend money to another, he himself guaranteed the payment, in case the principal debtor made default. Although *mandatum qualificatum* resembled *fidejussio*, there was some difference between them, namely, that in *fidejussio*, there was only one contract of suretyship, in *mandatum qualificatum*, there were really two contracts, viz., the contract of agency and suretyship, so that the creditor could sue on the former if he could not sue on the other.<sup>1</sup>

The duties of the agent were :

- (1) To carry out the terms of the contract ;
- (2) To show *exacta diligentia*. Hence, he would not be justified in exceeding the instructions given to him by his principal. If he did, the agent could not claim the value of the excess paid by him<sup>2</sup>.
- (3) To hand over to the principal everything acquired by him in the course of the agency.
- (4) To render proper accounts to the principal with reference to the transactions connected with the agency.

(d) a third party alone . . . ; (e) you and a third party . . . ; (f) you alone. If the requirement of interest is strictly construed, the first three constitute a mandate properly so called, the last three not."

<sup>1</sup> In an auction A suggests that a particular thing is going cheap and B buys it and suffers loss. No action lies.

<sup>2</sup> Supposing the agent was requested to buy a house for Rs. 5,000/- if he bought it for Rs. 5,500/- he would have to pay Rs. 500/- out of his own pocket.

The chief duties of the principal were :

- (i) to re-imburse the agent for all expenses and liabilities properly incurred by him in the course of his employment.
- (ii) not to revoke the agency to the prejudice of the agent.

The contract of agency came to an end in the following cases :

- (1) By death of either the principal or agent.
- (2) By either the principal or agent repudiating it in proper time before the latter started on his work.
- (3) By both the parties agreeing to terminate it at any subsequent time even while the business remained unfinished.
- (4) In case its object was fulfilled or became impossible of accomplishment.

Difference between Roman Law and the modern Law of Agency.

It is said that Roman Law never attained to a true, modern conception of agency. The agent in Roman Law always incurred a personal liability on contracts made by him. It is not so in modern systems of law, where he becomes exempt from all liability, if he makes known to the other party that he is contracting only as an agent for a particular person, provided of course he does not pledge his own credit.

In Roman Law, on the other hand a contract of agency was, in reality, a personal relation, and,

therefore a party to a contract could not escape liability by contracting as an agent to a named principal. At best it allowed a party to sue both the agent and the principal at a later stage by the *actio quasi institoria*, but originally the agent alone was liable. Hence there was no real agency in Roman Law in the modern sense of the term, where the agent incurred no liability and the principal only was bound.

The nearest approach in Roman Law to the modern conception of agency was in the following cases :

(1) Persons in the *potestas* of a *paterfamilias*, such as sons and slaves, could acquire for the head of the family. That is, originally, in the case of the son's contracts, the father would acquire all the rights as in a modern contract of agency, but the Roman father was exempt from liabilities under the contract. Hence ordinarily a son or slave could not as an agent enter into an agreement which involved both rights and duties, e.g., a contract of sale.

(2) Later the praetor gave to the party wronged by 'this unfairly one-sided state of affairs' a remedy called *actiones adjectitiae qualitatis*<sup>1</sup>, by which he saddled the father with liabilities, provided the son or the slave had contracted with a third party under the express orders of the *paterfamilias*.

(3) The praetor bound the *paterfamilias* on an implied contract of agency where the contract was entered into for the benefit of his estate.

i.e., actions of an additional or supplementary character.

(4) A contract entered into by the captain of a ship or manager of a business as an agent bound the employer who could be sued by the action *adjectitiae qualitatis*. But in that case the captain and the manager were also personally liable.

#### VI. QUASI-CONTRACTS

Quasi-contracts were obligations which were not the outcome of an agreement between the parties, but arose out of circumstances which were more analogous to a contract than to a delict and they were classed by a principle of law as quasi-contracts on grounds of equity and public policy.

There were six kinds of quasi-contracts :

- (a) *Negotiorum gestio* ;
- (b) *Tutela* ;
- (c) *Joint legacy* ;
- (d) *Co-heirs* ;
- (e) *Hereditatis petitio* ; and
- (f) *Indebiti solutio*.

(a) *Negotiorum gestio* arose in cases where one man transacted business for another in his absence and without his knowledge and without his express orders to do so. It may be said to be an instance of quasi-agency, e.g., A repaired his friend B's house, while B was away from his native town, to prevent it from falling down. A was the *negotiorum gestor*. In a case like this B who was benefited by A's act was bound to reimburse A for all expenses and

liabilities properly incurred by him in repairing the house.

For *negotiorum gestio*<sup>1</sup> the following conditions had to be satisfied :

- (1) The work done by the *negotiorum gestor* must be one which was really urgent ;
- (2) He must have done it with the intention of creating quasi-agency ;
- (3) The owner must not have previously told him not to do it.

A *Negotiorum gestor* must show *exacta diligentia* in executing the business undertaken by him.

*Negotiorum gestio* and agency differ in the following particulars :

- (1) The latter was created by the request of the principal, while the former arose without the instructions and without the knowledge of the principal.
- (2) Agency might be concluded to benefit not only the principal but third parties as well, while *negotiorum gestio* was made solely to benefit an absent person.
- (3) *Mandatum* arose out of agreement and was one of the recognised contracts, whereas *negotiorum gestio* was created by law on grounds of equity and public policy.

*Negotiorum gestio* resembled agency in that a *negotiorum gestor*, like an agent, could claim to be

<sup>1</sup> *Negotiorum*—of business ; *gestio*—a doing, performing.

re-imbursed for all expenses and liabilities properly incurred by him.

(b) *Tutela* is another case of quasi-contract i.e., the relation between a tutor and his pupil.

(c) In cases where two or more persons being co-legatees held some property in common, it would give rise to quasi contract.

(d) The relationship between co-heirs ;

(e) The heir *vis-a-vis* the legatees and others in a will ;

(f) *Indebiti solutio*, i.e., the right by which a person could recover money paid by mistake. To maintain an action *condictio indebiti*, the following conditions must be satisfied :

(1) The amount should not be due even under a natural obligation.

(2) It must have been paid by mistake.

(3) The person who received it must have acted in good faith. If not, he would be guilty of theft.

There were, however, some exceptional cases where it could not be recovered, e.g., money paid under a mistake of law. Again, in Justinian's time, a bequest or *fidei commissum* in favour of charities even by mistake could not be recovered. Further, in cases arising under the *lex Aquilia* (about B.C. 287), it could not be recovered. Under the Act, any person wrongfully killing another's slave or cattle would have to pay double the value, if he denied the allegations. Supposing a defendant admitted the claim, when in

fact he was not liable to pay, he could not subsequently recover it.

There was one more important case of quasi-contract, namely, the liability of *nautae, caupones*, etc., i.e., carriers by sea and hotel keepers to make good the loss to persons who left their goods in their custody.

#### VII. THE ENGLISH LAW OF *NEGOTIORUM GESTIO*

*Negotiorum Gestio* as an institution is not recognised in English Law. Generally speaking, in English Law

"no voluntary service can of itself give either a lien or a right of action for reimbursement. There is indeed very little trace of even sporadic cases. It appears that a husband, being bound to bury his wife, is liable to anyone, even a pure volunteer, who, in reasonable circumstances, has arranged for the burial; whether there is any wider liability under this head is not clear, and it is not insignificant that there was in Rome an *actio funeraria* for funeral expenses long before the *actio negotiorum gestorum* reached its development. Salvage is also a case in which purely voluntary service gives a claim, but this is not a common law notion: it is a matter of Admiralty Law, though common law seems to have recognised a possessory lien in such a case, giving a right to refuse the goods till compensation for service was given.

But though our law rejects the principle of *negotiorum gestio* it is able, by its doctrine of agency by necessity, to give relief in some cases which present a certain analogy to it. Thus a ship-master may, in case of urgency, pledge his principal's credit; a carrier who is carrying perishable goods and is unable to communicate with the owner may in certain circumstances sell them; a person who supplies necessaries to a wife who is deserted by her husband may have a claim to reimbursement."

#### VIII. THE TRANSFER OF CONTRACTUAL RIGHTS AND LIABILITIES

The only way of transferring rights and liabilities under a contract was by novation. If a man owned some money to another, he could not transfer his obligation to pay the debt to a third person without the consent of the creditor. But for this rule the principal debtor might escape liability by substituting an insolvent in his place. The benefit under a contract could ordinarily be transferred only by novation which is simply a case of substitution of a new creditor. Gradually it became the practice for the original creditor to transfer his rights by enabling the transferee to enforce the obligation as his agent in name, but, in fact, he allowed the latter to retain the benefits for himself. This kind of fictitious agency was called *mandatum in rem suam*. This was

in reality not the assignment of the benefit under a contract, but of the right to sue for it. In other words it was merely an assignment of a chose in action. A novation, as an assignment of a chose in action, had its defects.

First, as it had to be created by way of a fictitious agency, it was subject to the rules of the law of agency. The assignment of a debt or a chose in action became void as soon as either the original creditor or the formal agent died, for agency ceased either by the death of the principal or the agent.

Second, the original creditor or the principal could revoke the agency at any time before the transferee sued on the debt, or before the suit reached the stage of *litis contestatio*. Owing to these defects, it subsequently became the rule that once the agent gave notice of the transfer to the debtor, the right of the principal to revoke it ended.

Ultimately, owing to the intervention of the praetors, the assignment of a debt was no longer dependent on the law of agency. As soon as the creditor transferred his rights under a contract, the transferee was entitled to enforce it in his own name by an action called *actio utilis* and, further, the assignment was not affected either by the revocation or the death of the transferer.

Points of comparison and contrast between Roman Law and English Law :

## COMPARISON

- (1) In both, the debtor was not bound by the transfer until he received notice from the transferee to that effect.
- (2) In both the assignee took the debt subject to equities, i.e., all the defences which were open to the debtor as against the former creditor were available to him as against the transferee.

## CONTRAST

- (1) In England, no assignment of a debt or chose in action could be made without certain forms being observed. For one thing, it must be in writing ; whereas, in Roman Law, no form, not even writing, was required to transfer the benefits under a contract.
- (2) In English Law, after the Judicature Acts of 1873<sup>1</sup>-1875, a valid assignment of a debt could be made at law, while, in Rome, such an assignment was never recognised by the Civil Law. It could be done only by means of the *actio utilis* under the equitable jurisdiction of the praetors.
- (3) In English Law, the question as to whether there was valuable consideration for the

<sup>1</sup> Before that it could be done only under the rules of the court of Chancery which is a court of equity.

transfer as between the original creditor and the transferee was never of any importance, whereas, in Roman Law, by the *lex Anastasiana*, in some specified cases, the latter was not allowed to recover more from the debtor than he had actually paid to the transferer.

#### IX. THE DISCHARGE OF CONTRACT

A Contract was dissolved in the following cases :

First, by actual performance, e.g., X bought some bread from his baker and it immediately created an obligation that he should pay for it. The moment he paid the money it came to an end.

Second, impossibility of performance, e.g., if X promised to sell his house to Y and before he could convey it to him, it was destroyed by fire, no action would lie against him.

Third, by release. There were two kinds of releases (*a*) formal and (*b*) non-formal.

(*a*) A formal contract could be extinguished only by another formal one. Thus a contract of *nexum*, created by *mancipatio*, could be dissolved only by another *mancipatio*, by simply reversing the process. Similarly an agreement formed by a *stipulatio* could be released only by another *stipulatio*. About the year B. C. 66, the *Aquilian* stipulation was introduced, by which any obligation could be converted into a single verbal contract. Then by means of another stipulation

the promissee released the promisor of his obligation, thus putting an end to all the agreements as it were at one stroke.

(b) As regards the release of a contract in a non-formal manner, originally there was no method by which a formal contract could be extinguished in a non-formal way. If, for instance, a creditor informally released a debtor of a debt contracted in a formal way, the praetor considered it inequitable that the creditor should enforce this obligation and he refused to give the latter his legal remedy. This protection given to the debtor was in effect a non-formal release.

Four, in cases where the action was barred by limitation.

Five, by suit in a court of law. When an action reached the stage of *litis contestatio*, the original obligation was *ipso facto* dissolved.

Six, by death. The ordinary rule was that neither the benefit nor the liability under a contract was dissolved by the death of either the promisor or the promissee, for they descended to the heir. But there were certain exceptions to this rule, namely:

(i) Partnership: the death of a partner dissolved the partnership.

(ii) Agency: the contract of agency was extinguished by the death either of the principal or the agent.

(iii) A contract for personal services was nullified by the death of the workman.

Seven, by merger or consolidation. If the debtor was the sole heir of the creditor, the debt was extinguished.

Eight, by novation.

#### X. THE LAW OF OBLIGATIONS (DELICTS)

A *delict*<sup>1</sup> may be defined as "an act which gives rise to a right or action for damages, being a wrongful act or injury consisting in the infringement of a right created otherwise than by contract". *Delicts*, were, generally speaking, offences against the state, and they were punishable under the Roman law of crimes. Besides liability under the criminal law—a branch of public law—the wrong doer was also in many cases liable under the private law with which alone we are here concerned. He was, first of all, obliged to adequately compensate the person wronged, "to make his condition as good as it would have been if the wrong act had not been done". Further, in many cases, he had to pay to the party injured a penalty for the wrong done him. For instance, a thief had not only to restore the thing stolen but he was also bound to pay the owner as penalty, two or four times its value according to the circumstances of each case, which was entirely separate from the punishment inflicted by the state for the crime.

<sup>1</sup> From *delictum*—delinquency.

"The Roman Law of delict had its roots in a distant past and even in Justinian's system retained many archaic features. In modern systems criminal process is usually directed to punishment, civil process to compensation. It is a peculiarity of the Roman Law, that the civil law of delict is largely penal in character. The sum in which a wrong-doer was condemned might exceed and often greatly exceeded an estimate of the damage sustained. It was a fine imposed as a punishment for the wrong, which went, however, not to the State as in a criminal process, but to the injured person."

*Delicts* may be divided into wrongs against (1) persons and (2) property. "A wrong to the person was an '*injuria*'; harm done to property was *damnum injuria*, and a wrong to a person's interests by carrying off his property was *furtum*, or, if violence was used, *rapina* (or *vi bona rapta*)". These were the only four *delicts* mentioned in the Institutes of Justinian. There were, however, many other delicts recognised by the civil law and by the *praetor* and in statutes.

#### (1) INJURY TO PERSON (*INJURIA*)

*Injuria* may be defined as a wrong done to the person of any freeman either intentionally or by negligence. In the early republican period, the law on this subject was quite simple. The Twelve Tables laid down the penalty to be paid as compensation to the

wronged party as 300 *ases* for bones broken, if he was a freeman, and 150 *ases*, if a slave. In the case of all injuries other than maiming or fracture of a bone, the penalty was 25 *ases*. In the later republic, owing to the fall in the value of money this amount became a nominal sum worth about one shilling, and so it is said of a wealthy Roman youth named Veratius, that he, in Gibbon's words, "indulged himself in the cheap amusement of breaking and satisfying the law of the Twelve Tables ", by running through the streets and giving a slap on the cheek to any man or woman whom he met and that "his attendant purse-bearer immediately silenced their clamours by the legal tender of 25 pieces of copper ". The *praetor*, however, remedied this defect in the law by allowing the plaintiff to claim such damages as he might for the injury, while the judge decreed what he considered reasonable under the circumstances. In the case of *injuria atrox* (aggravated injury), the *praetor* himself laid down the amount to be paid by the defendant. Further, in later law, *injuria* included a great variety of wrongs such as assault, battery, wrongful confinement, defamation, offences against chastity, and so on.

#### INJURIA ATROX

An *injuria* is said to be aggravated on account of (1) the nature of the act, as when a person was beaten with sticks, (2) the place where the act was committed, e.g., in a public place like the market,

(3) the part of the body wounded, e.g., the eye ; (4) the status of the person injured, e.g., a magistrate or parent or patron.

Ordinarily, a slave could not be subjected to an *injuria*, unless it was of such a nature that it amounted to a constructive insult to the master. In the case of a *filiusfamilias*, there could be an *injuria*, but only the *paterfamilias* could, barring certain exceptional cases, sue for the injury. The *paterfamilias* could sue both on his own account as well as on his son's and was entitled to recover damages on both counts. Similarly, a husband could recover damages in respect of *injuria* to his wife and a father-in-law in respect of *injuria* to his daughter-in-law.

To claim damages for this wrong, one should prove that his feelings were injured, for this was the gist of the injury. In Dr. Lee's words, "if I do not show resentment it is supposed that I do not feel it. This is what is meant when it is said that the action is destroyed by dissimulation if the victim of the affront conceals his feelings. For the same reason the action is barred after an unusually short time, *viz.*, one year".

Lastly, there was no *injuria* without the intention to injure, just as there was no theft without a dishonest intention.

## (2) THEFT (*FURTUM*)

Theft may be defined as a "dishonest handling of a thing with a view to gain either the thing

itself or the use or possession of it". We will comment on this definition.

*Dishonest.* There must be a dishonest intent. Hence insane persons and young children could not be guilty of theft.

*Handling.* Unlike English law of larceny, there need not be a taking away or "asportation", e.g., a depositary is guilty of theft, if he hides the thing with the wrongful intention of appropriating it.

*Of a thing.* The thing must be moveable. Hence immoveable property could not be stolen, but trees or fruit growing on the land and sand or chalk forming part of it could be stolen. *Or the use or possession*, i.e. *furtum usus* or *furtum possessionis*. It is *furtum usus* where a borrower in the contract of *commodatum* misuses a thing lent to him. A man may steal possession of an object which is in the lawful possession of a non-owner, e.g., A gives his gold casket to B, a goldsmith, to be mended; A surreptitiously takes it away from B's counter in order to avoid paying the price for repairs.

*With a view to gain.* This is an important part of the definition. If a person with the intention of causing loss and with no eye to gain throws a silver goblet belonging to another into a river, there is no theft.

Further, in case the owner consents to what is done, there is no theft. For example, if A, the owner of a slave B, allows B to take his purse to C, a thief, who tries to induce B to give it to him by offering a bribe, and B, being honest, informs his master about it, and

in order to apprehend the thief the master consents, is C liable for (1) theft and (2) for offering a bribe? There was a great difference of opinion on this subject among the ancient jurists. Some held that C, the thief, was not liable for stealing "a thing which has not been stolen" nor for "corrupting a slave who has not been corrupted". Justinian, however, held illogically that the thief was liable in both the cases, a judgment which is not founded on any sound legal principle.

#### KINDS OF THEFT

In the Twelve Tables theft was divided into (1) *furtum manifestum* and (2) *furtum nec manifestum*. Taking the former first, it was said to be *manifestum*, either when the thief was caught red-handed while committing the act, or, according to Justinian, was found at any time with the stolen article before he reached his place of destination, where he meant to carry and secrete it. Here, the injured party might recover four times the value of the loss suffered as a penalty by the *actio furti*. It was said to be *furtum nec manifestum*, when the thief was not caught in the act, the penalty being double the value of the article stolen, besides, in either case the thief had to restore the stolen property. To quote a learned writer,

"why this distinction was made between the two kinds of theft, why one was visited with a larger penalty than the other, is a curious and

perplexing question. In explanation of the difficulty, it has been suggested that these private-law penalties were originally designed to prevent attempts at self-redress; that they were a kind of legal commutation for punishment which the injured party would be disposed to inflict with his own hand on the wrong-doer. Now, against a thief caught *flagrante delicto*, the sudden wrath of one whose property was being carried off before his eyes would prompt him to severer inflictions than he might care for when his anger had time to cool. This natural effect of sudden and strong excitement we may suppose to be allowed for, and represented in the heavier penalty of the *furtum manifestum*."

Any one who aided and abetted the commission of a theft was also guilty of theft and was liable to be sued by the *actio furti*, but he would be liable only if he did some overt act to assist the thief. In other words, his act should amount to something more than mere advice.

In the case of theft, not only the owner of the article stolen could sue the thief, but also any one who had some valuable right in the thing. Every person who was under a legal obligation to take care of any property was considered at fault if the thing was stolen. Thus, if a fuller or tailor takes clothes to be cleaned and done up or to be mended for a fixed price, and they are stolen from him, it is he, and not the owner, that could bring the action for theft.

The owner had no interest, as he could sue them for the value of the things stolen. But if they were insolvent, the owner was allowed to sue the thief. Justinian, however, enacted in the case of the contract of *commodatum* that the owner might sue either the borrower or the thief, but if he chose to go against the former, he would not be allowed to drop the action and sue the thief, unless when he sued the borrower he was unaware of the theft. The owner would have the advantage of getting double the value of the stolen article, in case he sued a solvent thief. But in the case of the gratuitous contract of *depositum*, it was the owner and not the donee who could sue the thief, for in this case the latter was not liable for negligence and hence he was not liable to be sued for loss by theft.

### (3) ROBBERY (*RAPINA* OR *VI BONA RAPTA*)

In the later Republican period, a distinction was drawn between *furtum* (theft) and *rapina* or *vi bona raptum* (robbery). The latter was merely "theft accompanied by violence". In this case the action allowed to the injured party was called *actio vi bonorum raptorum*. He could claim four times the value of the thing, if action was brought within a year, if not, the actual value only. The person wronged could make use of this action even though the thief was not caught in the act of committing the crime. To quote from the Institutes, "A man who takes by force what

belongs to another is liable for theft—for who is more completely a thief than the man who robs?—and so robbers are very properly said to be ‘impudent thieves’”. Lastly, it will be observed that *rapina* not only gave rise to a civil action but was also considered a crime.

Here we may note the distinction between robbery and the forcible seizure of property under a claim of right. By a statute of A.D. 389, it was made illegal for anyone violently to carry off moveable property or live-stock or to make forcible entries in respect of lands and houses, even if he erroneously supposed that the property belonged to him; and if any one disobeyed this rule and forcibly seized property, he forfeited his ownership if he owned it, and, if not, he had not only to return it but should also pay its equivalent in value. This was also the rule in Justinian’s time.

#### (4) UNLAWFUL DAMAGE TO PROPERTY (*DAMNUM INJURIA*)

In respect of injury to property, it is doubtful whether there were any general provisions on the subject in the Twelve Tables excepting a few rules regarding *noxal* surrender<sup>1</sup>. Later, under an important statute, Lex Aquilia (B.C. 286), it was specifically enacted that *dannum injuria* comprised all wilful or

<sup>1</sup> If damage was done by an animal, its owner might surrender the animal to the injured party, or pay compensation to him. In the former case it was *noxal* surrender. The same rule applied in the case of a slave or a *filius-familias* under power.

negligent injury to the property of another which diminished its value and was measurable in money. It laid down the amount of damages recoverable by an injured party. Its main provisions were as follows:

(a) In case a person's slave or horse or a domestic quadruped reckoned among cattle, was wrongfully killed, the owner was entitled to the highest price for which it could have been sold within the preceding twelve months.

(b) In all other cases a person could only claim the highest price which it would have fetched within thirty days preceding the injury.

The following features of this Act may be noted :

(1) Under this unscientific enactment, if the defendant after denying the plaintiff's claim, was found liable, he had to pay double the damages.

(2) To maintain an action under this statute, the injury to the plaintiff should be direct. No provision was made for indirect injuries. For example, to throw a stone and injure a bull entailed liability ; but on the other hand to excite a bull by intentionally showing a red rag so that it ran over a precipice and was seriously hurt, was not actionable. The praetor, however, changed the law on this subject. In Dr. Hunter's words,

" The statute gave an action only when the damage was done to a body by a body (*corpore corpori*) ; but the praetor after the analogy of the statute gave a remedy when the damage was done

not directly by the body (*non corpore sed corpori*) and even when no damage was done to the thing itself (*nec corpore nec corpori*). In the first case, the action was said to be *utilis*; in the second case, an *actio in factum*, as it was called, was granted. Thus if I shut up another man's slave or cattle, and starve them to death, or drive a beast so furiously as to founder it, or terrify cattle to rush over a cliff, or persuade another's slave to climb a tree or go down a well, and he in climbing or going down is either killed or injured in some part of his body, then against me an *actio utilis* is given. If, on the other hand, a man thrusts another's slave from a bridge into a river, and the slave is drowned, then he is directly liable within the words of the statute, as it is with his body he did the damage. If, again, a man moved by pity frees another's slave from his fetters to release him, he damages the master's interests, but not the body of the slave; and for such cases provision was made by the *actio in factum*."

(3) Further, it was necessary that the damage to be actionable should be done by the defendant either intentionally or by negligence. What was negligence depended upon the circumstances of each case. To take a classical example—if a person practising the javelin hurts another, his liability would depend upon whether he was a soldier practising at a place reserved for the purpose or elsewhere. If it was the former,

*prima facie*, there was no negligence. But, if he were not a soldier, he would be *prima facie* liable even if he practised in the *campus martius*.

Again, for the purposes of this statute, want of skill was regarded as equivalent to negligence, for example, if a quack doctor injured the eye of his patient by bad surgery or an inexperienced rider of a horse caused damages to some one on the road.

(4) In awarding damages under the *Lex Aquilia*, the praetor did not confine himself to its provisions. He not only took into account the actual value of the thing that was damaged or destroyed, but he also gave consequential relief. For instance, if a man killed one of a pair of horses or destroyed a piece of rare china thus injuring a set, the plaintiff was entitled not merely to the price of the animal or the article but also to the total loss incurred by him by depreciation in the value of the rest.

#### XI. QUASI-DELICTS

Besides *delicts*, there was in the Imperial period another class of civil wrongs called *quasi-delicts*, which were only extensions of the law of *delicts* analogous to obligations arising out of delict. The effect of *quasi-delict* was the same as a *delict*. That is to say, the offended party had an action at law to claim pecuniary satisfaction for the loss suffered by him. Therefore, there is no real distinction between a *delict*

and a *quasi-delict*. In the Institutes four cases of *quasi-delicts* are mentioned—"The implication seems to be that in all of them the law creates a liability though the defendant may not in fact be to blame". We may now briefly notice the following :

- (1) the liability of a *judex* or a municipal magistrate for making an unjust or partial decision. This principle did not extend to the higher class of magistrates such as the *praetor*. It will be noticed that the *judex* was liable for any irregularity, even though it might be most innocent. If he was guilty of grave misconduct, he would also be liable to be criminally punished.
- (2) the duty of the owner of a house to make compensation for the injury caused to a passer-by owing to something thrown out of or poured from his residence.
- (3) If a person kept something so placed or suspended that, in case if fell it was likely to injure some one, he was liable to a penalty of 10 *aurei*, even though none was hurt.
- (4) The obligation of common carriers, or inn-keepers and stable-keepers for theft or wilful damage caused by their servants to the property of their customers.

*The Law of Succession*

## XII. UNIVERSAL SUCCESSION

Universal succession is defined by Maine as "a succession to a *Universitas Juris*<sup>1</sup>. It occurs when one man is invested with the legal clothing of another, becoming at the same moment subject to all liabilities and entitled to all his rights". Universal succession, as opposed to particular succession, arises where a person succeeds to all the rights and liabilities of a deceased person taken in the aggregate. For example, the legal position of a man on his death might consist of a few items of property moveable or immovable. He might have also certain obligations to perform, such as debts which he had contracted in his lifetime, so that he would leave on his death certain rights and obligations which might be summed up as his legal personality. The heir succeeding to the entire legal personality of another, to all his rights and liabilities, is the universal successor. Cases of universal succession generally occurred either on intestacy or under a will. If on the other hand a person received only a particular portion from the estate of a deceased person without being bound at the same time by the liabilities to which the estate might be subject, it would be a case of particular succession, e.g., a legatee under a will. Among other examples of universal succession may be mentioned, *adrogation*, *marriage in manum*.

<sup>1</sup> *Universitas Juris*, i.e., "an university (or bundle) of rights and duties."

## XIII. TESTAMENTARY SUCCESSION

To make a valid will the following conditions must be satisfied :

- (1) the testator must comply with certain forms ;
- (2) he must formally disinherit certain persons ;
- (3) he should provide for certain persons ;
- (4) the appointment of the heirs should be properly made ;
- (5) there should not be disqualification in the testator or the witness or the heir.

(1) The formalities of a Will.<sup>1</sup> The earliest form of a will was where a testator declared his intentions in public orally before the assembly, the *comitia curiata*, which, when it met for this purpose, was called *comitia calata*, and the will was *testamentum comitis calatis*<sup>2</sup>. To dispose of one's estate by will, being a matter of great significance not only to the family concerned but also to the Roman State, it was considered as a matter of national importance.

In the early Republic, there was also another kind of will made on the battle-field when the army was in battle array. It was made by word of mouth before three or four witnesses who were comrades-in-arms,

<sup>1</sup> The characteristics of a modern will are : (i) it is a unilateral and not bilateral transaction ; (ii) it is written in secret ; (iii) it can be revoked any time by the testator during his life time. In the early Roman Law on the other hand the will had none of those characteristics.

<sup>2</sup> This could be made only by Roman citizens and probably was restricted to the *patricians* alone. It was a mode, like adoption, for continuing the family of the testator when he had no other heirs to succeed him.

and it was called *testamentum procinctum*. Both these forms became obsolete by about B.C. 63.

*Mancipatory will* (*testamentum per aes et libram*<sup>1</sup>) marked the next stage in the growth of the Roman will. It was originally a fictitious conveyance *inter vivos* by the testator to the heir who was called the *familiae emptor* or the purchaser of the family. It was neither secret nor revocable. Later, during classical times, the transfer of the estate to the heir did not take place until the testator's death, when the *familiae emptor*, who was no longer the heir but a trusted friend of the testator, handed over the inheritance to the heir named in a will left by the testator. By the time of Gaius, the *mancipatory will* had undergone a great change. The *familiae emptor* was no longer the testator's heir or friend but a mere figure-head who was summoned merely to carry out the terms contained in a document, which was kept secret until the testator's death.

The *praetor*, in course of time, began to give effect to a will even though it was not executed with all the cumbrous formalities required under the civil law, provided a written document containing the wishes of the testator was produced, signed and sealed with the names and seals of seven witnesses. The number seven<sup>2</sup> represented the persons who

<sup>1</sup> It means, a will made with copper and scales. It was specially devised for the convenience of plebeians who could not make a will before the *comitia calata*.

<sup>2</sup> i.e. five adult Roman witnesses, a balance holder (*libripens*) and the *familiae emptor*.

were required for a formal will *per aes et libram*. This praetorian will was not recognised by the civil law and the result was as if no will had been made. But the praetors recognised the persons named in the will as heirs, and gave the possession of the property to them by a remedy called *bonorum possessionem secundum tabulas*<sup>1</sup> which was mainly an equitable relief. The persons to whom possession was thus given became full or *quiritary* owners under the civil law after the lapse of one year according to the rule *usucapio pro herede*.

The Imperial will (*testamentum tripertitum*) was introduced by Theodosius II and Valentinian III in A.D. 439. The seven witnesses to a will had, not only to seal, but to sign the testament. The testator also was required to sign it, but if he could not write, an eighth witness was required to sign for him. This testament was called *tripertitum*, because it was derived from three sources, namely (1) the Civil Law which required that it should be made in the presence of seven witnesses as part of one and the same transaction, (2) the preator's edict under which it had to be sealed with the seals of seven witnesses, and (3) the Imperial legislation which required the signature of the witnesses as well as of the testator. It was universally prevalent in the Eastern half of the Roman Empire, while the *mancipatory will* continued to exist in the western half right down to the middle ages.

<sup>1</sup> Possession in accordance with the terms of the will in equity.

In addition to the *testamentum tripartitum*, there were three other forms of will prevailing in Justinian's time *viz.*, (1) the private *nuncupative* will which consisted solely in an oral declaration in the presence of seven witnesses, and (2) the public *nuncupative* will in which an oral declaration was made before a magistrate who had it entered in the public records; and (3) the public written will which consisted in delivering the document to the emperor with a petition for its sanction.

#### (2) THE DOCTRINE OF DISINHERISON<sup>1</sup>

First of all, certain persons, if not made heirs, had to be expressly disinherited. If not, the will would be void. There was no rule compelling a testator to appoint an heir. He might disinherit all. But attempts were made later to put some restrictions on the unrestricted power of the *paterfamilias* to disinherit all his children. The doctrine of *disinherison* was the first step in this direction.

The heirs of a Roman citizen called *sui heredes* were all those persons who were under his *potestas* and who became *sui juris* on his death. In other words, a testator could count as his heirs only those who were members of the agnatic family of which he was the head. If he were to die intestate, the inheritance would be divided equally amongst his sons and daughters and others who were under his

<sup>1</sup> Disinheriting.

*potestas*. The theory was that all the members of the family were co-owners of the property belonging to it, although the *paterfamilias* was given absolute powers of disposal in respect of its assets. Hence, if the *paterfamilias* wanted to dispose of the property in a way contrary to the ordinary rule of succession, he had to do it expressly so that there might be no doubt as to his intentions. Otherwise, the presumption was that his descendants continued to be heirs.

The rules as to *disinherison* were as follows: In the case of a son, he had to be expressly disinherited, *nominatim*, that is, by name; if not, the will would be void. Other heirs, namely, daughters and grandchildren under *potestas*, might be disinherited by a general clause (*inter ceteros*).<sup>1</sup> As to emancipated children, they need not be, either instituted heirs or disinherited, for they were considered outside the agnatic family; similarly, as to children given away in adoption.

In the Imperial period, the rules of *disinherison* were as follows: In respect of posthumous children (*i.e.*, children born after the will was made), if males, they should be instituted or disinherited individually by name (*nominatim*), if women, either *nominatim* or *inter ceteros*.

Emancipated children: under the Civil Law, they need not be instituted as heirs or disinherited, for they were considered to be outside the agnatic family. But the *praetor* considered this rule to be contrary to

<sup>1</sup> Collectively.

justice and equity, and he gave such heirs as were disinherited, an equitable remedy called *bonorum possessio contra tabulas*<sup>1</sup> by which he gave possession of the estate to such persons in opposition to the terms of the will.

Adopted Children : they were treated just like the children of the adopter so long as they continued to be under his *potestas* ; but if they were emancipated, they lost their claim to be instituted or disinherited as heirs. Again, the children given away in adoption had no claims over their natural family. If, after adoption, the adopter emancipated them, they lost their rights in both their natural and adopted families. But, in such cases, the praetor gave them *bonorum possessio* in respect of the property of their natural father, unless they were disinherited by him.

Justinian effected certain reforms in the law of *disinherison*. Firstly, he decreed that all *sui heredes*, whether males or females, should be expressly instituted or disinherited *nominatim*.

Secondly, mothers and maternal grandfathers were exempted from the rules of *disinherison*, as they were not obliged to disinherit their children or grandchildren.

Thirdly, as to posthumous children, he enacted that they must be instituted or disinherited *nominatim*.

Fourthly, the same rule applied to emancipated children. In other words, they had to be also instituted or disinherited *nominatim*.

<sup>1</sup> Possession contrary to the terms of the will in 'equity.'

Fifthly, by reason of the changes effected by Justinian in the law of adoption, the only instance where the adopted person had to be instituted or disinherited by name was when the adoption was by an ancestor; for only then did the person adopted become part of the adopter's family. In all other cases, he continued to be a member of his natural family as noticed elsewhere.

Sixthly, a testator was obliged to mention specifically the grounds which induced him to pass over the rights of his legitimate heirs.

### (3) THE DOCTRINE OF LEGITIMA PORTIO

The Testator must provide for certain persons. That is to say, a will was void when certain near relations, such as parents, children, brothers and sisters were disinherited without any just cause. This rule rested on the principle mentioned already that all the family property belonged in theory to the whole of the family, for in fact it had been gathered by the help of those comprising it. All the earnings of the junior members in a Roman family became the property of the father because they were under his *potestas*. To allow the *paterfamilias* to take all that they earned, and at the same time to give him absolute powers to bequeath the entire property to strangers would mean grave injustice. For, from the first, the testamentary power was regarded as something exceptional and, as Dr. Hunter remarks, "an invasion of

the rights of the family". Originally, there was no settled rule to prevent a testator from disinheriting all his children and leaving them destitute, except a sense of moral duty. Gradually a remedy was found to rectify this defect on the ground that the will executed was contrary to the testator's duty.

This subject may be considered under the following heads :

- (a) the duty of the testator ;
- (b) limitations imposed on this duty ;
- (c) the effect of a will when this rule was broken.

(a) A testator was obliged to leave a certain portion of his estate to near relations, e.g., descendants, like sons, grandsons, but not emancipated children ; ancestors, like father, grandfather ; and collaterals, such as brothers and sisters. As regards the quantum that must be given to these relations, the rule under the *Lex Falcidia* (B.C. 40) was one quarter of the amount they would have obtained had the deceased died intestate, that is, one fourth of the estate after deducting from it all necessary expenses, such as funeral charges and debts due by the deceased. If there were more than one such claimant, they would have to divide the fourth of the assets due to them equally. For example, if there were four children, each one of them would have got one-fourth of the property of the *prepositor*, in case he died intestate. Therefore, under the Act, each would be entitled to one-sixteenth share of it as his *legitima portio*, and he was restrained

from bringing an action called *querela inofficiosi testamenti*<sup>1</sup> to set aside the will as being unduteous.

(b) The duty of the testator to leave a certain portion of his inheritance to the heir rested on a moral claim, and hence, if the persons entitled to claim it were guilty of serious misconduct<sup>2</sup>, they lost the benefit of this rule. But this rule did not apply to a special class of will called soldiers' wills.

(c) If nothing was left to the persons entitled to the *legitima portio* the result was that the will was void, and the heirs succeeded to the testator just as if there was no will. So also, originally, if the testator left something but not enough to satisfy this rule, it resulted in upsetting the will altogether when it was said to be *testamentum inofficiosum*. This means "a will executed against one's duty to one's kindred". In that case it was presumed that the testator had acted as if he was mad when he made the will; that is, not that he was really insane, but only that it was to be regarded as having been executed when the testator was out of his mind. All near relations who were not given their *legitima portio* were entitled to have the will set aside, if they were disinherited, by the *querela inofficiosi testamenti*. Not only descendants but also ancestors and collaterals could bring this

<sup>1</sup> An action to set aside a will as being executed contrary to one's duty as a parent.

<sup>2</sup> Some of the grounds for disinheriting a child were: (1) assaulting one's parent; (2) adopting some dishonourable profession, such as that of a comic actor, except when the parent also belonged to some such profession; (3) in the case of a daughter, if she married a freedman without her parent's consent, and similarly, if she conducted herself in a way calculated to bring disgrace to her parents.

action which was available also to adopted children, provided they had no other way of obtaining a share of the inheritance. But relations remoter than brothers and sisters could not successfully sue to have the will set aside. To avoid this contingency, it was usual for testators before Justinian's time to insert a clause in the will that, in case the amount proved to be insufficient, the heirs should make up the deficiency. Thus the will was saved from the action *querela inofficiosi testamenti*, as that could be taken only where the aggrieved party had no other remedy to satisfy his claim.

Justinian ordained that a testator should leave to his children at least one third of his entire property, when he left not more than four children, and one half, if they exceeded four. So that, under Justinian, each child, where there were four, would get a fourth of a third, i.e., one twelfth of the total net assets. If there were five children, a tenth of the inheritance, and so on. Those entitled to receive *legitima portio* should be instituted as heirs, and it was not enough that they got their shares in some way other than as heirs to prevent them from impeaching the testament as *inoffiosum*.

#### (4) THE INSTITUTION OF AN HEIR

First of all, the function of a Roman will was to appoint an heir to a person, all other objects (such as payment of legacies, appointment of a tutor etc.)

being only subordinate to this main object. If it failed in appointing an heir or heirs, the will was void. Therefore, the testator could not give legacies or manumit a slave or appoint a tutor by means of a will before appointing an heir, a violation of this rule would result in invalidating it.

Secondly, the appointment of an heir had to be made in Latin employing a set form of words, e.g., "Let Titus be my heir".

In A.D. 339, Constantine II, however, permitted it to be made in any terms by which the meaning of the testator could be clearly ascertained. Further, Justinian allowed a person to make his will in whatever way he liked and did not penalise him by making it void, if he failed to institute the heir before dealing with other matters.

We may here mention two legal *maxims* (1) 'no one can die partly testate and partly intestate' and (2) 'once an heir, always an heir' (*semel heres, semper heres*).

First, a testator could not make a will in respect of only a part of his estate without reference to the rest of his property. If, for instance, X made a will and gave only part of the inheritance to Y, whom he instituted as his heir, Y would take the whole of the inheritance under this rule.

Second, 'once an heir, always an heir.' That is to say, the testator could not appoint an heir only for a particular period of time. If, for example, a testator appointed Y to be his heir only for six years, Y would

take the entire inheritance just as if there was no such condition and the clause limiting the estate was regarded as void, while the will was held to be good.

#### THE SUBSTITUTION OF HEIRS

The substitution of heirs consisted in providing an heir, or a set of heirs, as substitutes, in case the heir or the heirs first named, either died or declined to take the inheritance. It usually took the following form : X might say, " let Y be my heir, in case Y fails to take the inheritance within 100 days of my death, let Y be disinherited ; then let Z be my heir and decide within 100 days " and so on. Thus a testator could provide for as many substitutions as he pleased to prevent the contingency of the will being left heirless, and it was usual for him to name some slave of his as his heir in the end, for the slave could never refuse to take it. The effect of such a provision in the will was to release the slave from bondage. Generally speaking, before Justinian's time, the main reason for a person refusing to be an heir was in cases where a testator's liabilities exceeded his assets, that is, where the testator was insolvent. It would be hardly worth while for the heir to accept the inheritance under such circumstances, for, if he did, he being a universal successor, all the debts of the deceased would have to be paid by him. Such an inheritance, an insolvent inheritance, was called *damnosa hereditas*.

There were three kinds of substitutions :

- (a) *Vulgaris*
- (b) *Pupillaris*
- (c) *Exemplarialis* or *substitutio quasi-pupillaris*

(a) *Substitutio vulgaris*.<sup>1</sup> This substitution took place only, if the person named heir in the will refused to take up the inheritance. If on the other hand he accepted the inheritance, he forthwith became heir, and the substitute had no longer any chance of becoming one. To illustrate, a testator might say, "Let Titus be heir, and in case he fails to be the heir, let Sempronius be heir" and so on.

(b) *Substitutio pupillaris*.<sup>2</sup> This might be illustrated by the following example, "Let Titus, my infant, be my heir, but if he were to die before he attain age, let Antony be my heir". The difference between *substitutio pupillaris* and *vulgaris* is as follows :

(1) in the latter, once the heir first named accepted the inheritance, the substitute was completely shut out from the inheritance ; whereas in the former, he could come in even after the first named heir had accepted the inheritance.

(2) in *substitutio vulgaris* there was really one will, and if either the first named heir, or failing him the substitute, consented to be the heir, it had effected its purpose and there was an end of it ; whereas, in the other, there were in fact, two wills, namely, (i) the

<sup>1</sup> i.e., "belonging to the mass" or common.

<sup>2</sup> i.e., to a pupil or person under age.

testator's will and (ii) one made by the testator for the heir. In effect, this was the nomination of an heir to the son until he arrived at the proper age when he could make a will for himself.

(3) In the case of pupillary substitution, only a *paterfamilias* could make such a will on behalf of persons under his *potestas*, and the substitution could not be made to take effect beyond the age of puberty of the heir; while, in the other case, there were no such limitations.

It terminated in the following cases:

(1) If the child attained the age of puberty; (ii) if for any reason the father's will failed, it put an end to the *substitution* also, for it was entirely dependent on the first will; (iii) the same effect followed where<sup>\*</sup> the pupil suffered *capitis deminutio*.

(c) In Justinian's time, there was another kind of substitution called *quasi-pupillaris* or *exemplaris*. This was for mad people. A testator could make a valid *substitutio* even for children who had attained the age of puberty, if they were insane. But this could only be done by consent obtained from the Emperor by a petition. It continued until the beneficiary was cured of his disability.

#### (5) TESTAMENTI FACTIO

There were three forms of *testamenti factio*: (1) *activa*, i.e., the power to make a will; (2) *passiva*, or

the capacity to take benefits under a will ; (3) the capacity to witness a will.

(1) *Testamenti factio activa*. For this a person should have the *jus commercium* and must not be under any disability. He should have legal capacity both at the time of making his will and at the moment of his death. The following persons, for example, were regarded as incapable of making a will :

- (i) slaves ;
- (ii) persons who were not Roman citizens ;
- (iii) originally, women, so long as wills were made before the *comitia calata*, but with the introduction of the mancipatory will, this disqualification was removed, and they could make one, but only with the consent of their tutors ;
- (iv) the deaf, dumb, and blind persons, except in special cases ;
- (v) in early law, the *filiusfamilias* could not make a will, but in the Imperial period an exception was made in respect of his *peculium castrense* ;
- (vi) similarly, mad men, persons under puberty, interdicted prodigals, etc.

(2) *Testamenti factio passiva* is the capacity to take under a will, which was required (a) at the time when the will was made, (b) at the moment of the death of the testator and, (c) when the heir claimed the inheritance. It will be observed that a person might not have *testimenti factio activa*, but he might

have the capacity to be a beneficiary, for instance, a person under puberty could accept any benefit conferred on him by a will, although he was disabled from making one himself. The following persons were regarded as incapable of being beneficiaries :

- (i) persons who were not Roman citizens ;
- (ii) corporations and municipalities, for they were considered as uncertain persons (*incertæ personæ*).
- (iii) women, in certain cases. Under the *lex Voconia* (B.C. 169) testators, the value of whose estate was assessed in the census at 100,000 ases or more, could not make women their heirs. But this rule was abrogated during the early Imperial period.
- (iv) Under the *lex Julia et Papia Poppæa*, (A.D. 9) bachelors could not be beneficiaries under a will. A childless person could only take half of what was given him. These disabilities, however, were removed by Constantine.
- (v) Again, natural children and their mothers were also excluded, but constitutions of Valens, Valentinian and Gratian, allowed a twelfth of the testator's property to be given to the natural children and their mother, where there were legitimate children, and a fourth, where there were none, but only in

case the testator's parents were not alive.

(3) *Testamenti factio* to witness a will. The person should possess legal capacity only at the time of evidencing it. The following, for example, were, incapable of being witnesses :

- (i) *filiifamilias* of the testator ;
- (ii) women ;
- (iii) persons under puberty ;
- (iv) deaf, dumb or blind persons ;
- (v) slaves ;
- (vi) insane persons.

#### XIV. INVALID WILLS

A will might become invalid in the following cases :

(1) If the testator made a second will<sup>1</sup> in a proper manner, the first will was revoked. But the first will would be valid, if the second will was either incomplete or was legally defective.

(2) If, after the will was made, a child was born in the family of the testator whom the testator was bound to nominate as heir or to disinherit expressly, or to whom he was bound to leave some property as *legitim*, then also the first will was annulled. Similarly, during the Republic, if a person after making a will adopted a child or married *in manum*, the effect was

<sup>1</sup> A will is said to be *ruptum* or revoked when a new will was made by a testator superseding the old.

to invalidate the will. In that case, the testator had to make it over again.

(3) If the heir mentioned in the will either died before the testator or refused the inheritance, though he survived him, or lost the capacity of taking under the will, the result was that the will became invalid.

(4) By the testator undergoing *capitis deminutio* at the time of his death.<sup>1</sup>

(5) A Roman will might become void because it violated the rule as to *legitim& portio*.

(6) The last condition for the validity of a Roman will was that an heir or heirs should duly enter upon the inheritance on the death of the testator. If they did not, the will became ineffectual or *destitutum* and the result was as if there was no will.

#### XV. CLASSES OF HEIRS

There were three kinds of heirs :

(i) Necessary heirs (*heredes necessarii*). They were the slaves of the testator whom he had instituted as his heirs. They were said to be necessary because they were bound to accept the inheritance. They were appointed heirs only when the testator was on the verge of insolvency, so that he might be saved from the disgrace to his name consequent on the insolvency proceedings which might be taken in his

<sup>1</sup> It was called *Irritum* or an ineffectual will, when a testator, after having made his will, suffered *capitis deminutio*.

name after his death. If the slave became the heir, he shouldered the burden of insolvency for the sake of his master, and he also attained his liberty forthwith. In course of time the praetor gave him the benefit of keeping the properties he acquired after the testator's death separate, and exempted such property from all claims against the testator's estate. This remedy was called the *beneficium separationis*.

(ii) Family heirs (*sui et necessarii heredes*). They consisted of all those persons who were under the *potestas* of the testator and who became *sui juris* on his death. They were also called *necessarius* because originally they were not permitted to refuse the inheritance. But later the preator gave them the liberty to refuse it, provided they expressly declared their intention to that effect, otherwise, the inheritance vested in them. This privilege is called *beneficium abstinendi* or the privilege of refusing the inheritance. Justinian made some radical changes in this branch of the law. In the words of Dr. Lee,

"A constitution of A.D. 531 made a revolution in this branch of the law by providing that any heir (testamentary or *ab intestato*) who had doubts about accepting or refusing might accept with benefit of inventory (*beneficium inventari*). If he did so, he had to make an inventory of the assets within thirty days of becoming aware of his right to claim the inheritance and complete it within another sixty days. By satisfying this requirement he escaped liability for the debts of

the deceased beyond the extent of the assets. In effect he was converted from a universal successor into an executor and residuary legatee. Justinian retained the alternative of applying for the *spatium deliberandi*.<sup>1</sup> An heir who accepted after deliberation incurred all the old liabilities of the universal successor. But he was not relieved from the duty of making an inventory. If he failed to do so, he was denied the benefit of the *lex Falcidia*."

(iii) Outside heirs (*heredes extranei*). They were persons instituted heirs in the will who were not under the *potestas* of the testator, that is, those appointed as heirs other than the persons mentioned above. They had to accept the inheritance definitely, failing which it was presumed they had declined it.

#### XVI. IMPOSSIBLE OR ILLEGAL CONDITIONS

As regards conditions imposed by the testator in the will, which were either impossible of fulfilment or illegal or immoral, the condition was void, but the will good.

Again, as to condition subsequent, stipulating that the heir should be deprived of his inheritance on the occurrence of a particular event, it was held that the condition was void, and the heir took the inheritance just as if there was no such restriction.

<sup>1</sup> *Spatium*—time allowed for any action; *deliberandi*—to carefully consider, i.e., time taken to decide after mature reflection.

But, in the case of a condition precedent, as, for instance, where a testator laid down that Y should be his heir only if he took to the profession of law, it was held to be good and originally the heir was not admitted to the inheritance until he first complied with the provision. But the praetor allowed the heir to take up the inheritance, even though the condition was not fulfilled, and gave him *bonorum possessio secundum tabulas* in case the heir gave an undertaking to restore the estate intact if he failed to fulfil it.

## XVII. IRREGULAR OR PRIVILEGED WILLS

### (1) SOLDIERS' WILLS

Soldiers and sailors on active service, owing to their ignorance of law and want of experience, were given certain exemptions in the matter of making wills from the time of Julius Caesar. The differences between an ordinary will and a soldier's will were:

- (a) If a soldier wrote a will primarily it did not require to be evidenced by witnesses.
- (b) If he made an oral will, it was enough if one or two persons were present at the time to prove the contents of the will and that he meant what he said.
- (c) A deaf and dumb person could not ordinarily make a will, but this rule did not apply in the case of a soldier.

- (d) The rule that prevented a person from dying partly testate and partly intestate was not applicable to a soldier's will.
- (e) The principle of the *lex Falcidia* relating to *legitima portio* did not affect his will, and he might so dispose of his estate as to leave nothing to his heirs.
- (f) He could make *peregrini* or the *latini Juniani* his heirs or legatees, which normally he could not do if he were not a soldier. But he could not make *incertae personae*, like corporations, his heirs.
- (g) He need not expressly disinherit his children, for it was presumed that his silence meant that they were tacitly disinherited. This was a breach of the rule that no valid will could be made unless the testator first expressly disinherited his heirs.
- (h) Unlike an ordinary will, a soldier's will was not affected by *capitis deminutio*.
- (i) He could dispose of his estate by means of *codicils* or informal wills.
- (j) Further, his will continued to be valid for one year after his honourable discharge from service.

In Dr. Lee's words, "A soldier (but, as Justinian enacted, only when on active service) might make his will as he pleased and as he could; it might be in a written instrument, it might be by an oral declaration in the presence of two or three comrades, it might be

by tracing characters in his blood on scabbard or shield, or with sword in the dust."

(2) WILLS MADE IN THE TIME OF PESTILENCE

In this case all the seven witnesses need not be together at the same time.

(3) WILLS MADE IN RURAL PARTS

Here five witnesses were sufficient.

(4) WILLS MADE BY A PARENT IN FAVOUR OF HIS CHILDREN

No witnesses were required if they were entirely written in the testator's hand.

XVIII. LEGACY

A legacy may be defined as a gift made by will by a person in favour of another. The main difference between a will and a legacy is that, in the case of the former, the testator appointed some one as his heir or universal successor; while a legacy is a form of particular succession, where the legatee acquired some specific property or properties. A legacy is only a mode of acquiring ownership of single things. "The topic of legacy is intimately connected with testamentary succession, for though there may be a will without a legacy, there cannot be a legacy without a will. . . . Legacy is vaguely described in the Institutes

as a ' gift left by a deceased person ' . . . . Thus, while inheritance was a form of universal succession, legacy was a form of particular succession ; and while the heir was liable for the debts of the deceased, the legatee was not liable for debts, but could not take, or having taken keep, his legacy until the debts were satisfied ".

This subject may be considered in the following order :

- A. Different kinds of legacies.
- B. Restraints upon the testator's power to give legacies.
- C. Failure of legacies.

#### *A. Different Kinds of Legacies*

During the Republic there were two classes of legacies.

(1) *Per vindicationem* and (2) *Per damnationem*.

(1) A legacy *per vindicationem* was one in which the testator had used the form *delego* ("I give, bequeath") or similar expression. For instance, a testator might say 'I give and bequeath my slave to Titus'. Here, the legatee Titus might claim the slave as soon as the heir entered upon the inheritance, and he could enforce his claims by a real action or *vindictio* against any one who might be in possession of the slave. Here the property vested in the legatee as soon as the heir accepted the inheritance.

(2) A legacy *per damnationem* on the other hand was given by the words "let my heir be condemned

to give (*dare damnas esto*) my slave to Titus". In this case the legatee did not become the slave's owner on the testator's death but only when the heir chose to hand the slave over to him. The legatee could enforce his claim only by bringing a personal action against the heir. It was called *damnationem* because the testator generally used the phrase *damnas esto*. This legacy had its own advantages. Firstly, the testator could not only give his own property, but could direct the heir to buy something owned by a stranger and convey it to the legatee. Similarly, as regards things not in existence at the time, e.g., future crops. Secondly, the heir might be asked to do something for the legatee, e.g., to build a house for him at some future date.

In the Imperial period, there were two less important forms of legacy, viz., (3) *per praceptionem* and (4) *sinendi modo*.

(3) The legacy *per praceptionem* was only a variation of the legacy *per vindicationem*, e.g. "Let Titus, my heir, take my slave before dividing the inheritance." It was created by the use of the word "*praecepit*", that is, let him take before. This form was used only when there were several heirs, and where the testator desired to benefit one of them more than the rest. Here the legatee did not become owner of the article until he actually received it by a suit for partition of the inheritance.

(4) The legacy *sinendi modo* was only a modified form of the legacy *per damnationem*, e.g., "Let my heir allow (*sinere*) Titus to take my slave". It was called

*sinendi modo*<sup>1</sup> because the testator usually employed the following words in making his bequest: " *damnas esto sinere* ". Here also the legatee could claim the slave only by bringing a personal action against the heir, and Titus became the owner only from the moment he received him. In this legacy the testator could not bequeath anything belonging to a third person as he could do in the case of the legacy *per damnationem*.

In A.D. 64, the *S. C. Neronianum* enacted that, if a legacy made in any one of the four forms was in danger of failing owing to some technical defect, it should be interpreted in a way most favourable to the legatee. That is *per damnationem*, because it was the one most favourable to the legatee. For example, if a person bequeathed something belonging to a stranger in the form *per vindicationem* the legacy would fail because the tendency of early Roman Law was to lay far more stress on the form than on the spirit of the testator's true intentions. But the statute came to the rescue of the legatee, for under this enactment it was construed as one given *per damnationem*. In A.D. 339, Constantine and Constans, dispensed with the necessity of employing the traditional forms of legacy which could thenceforth be written either in Latin or Greek..

Justinian abolished the distinctions that remained between the four forms of legacies, giving in each case a vested interest enforceable against the heir by a real action where the subject matter of the bequest

<sup>1</sup> *modo*—only, alone; *sinendi modo*—just be permitted. The legatee was permitted to take the slave instead of the heir being bound to give him *per damnationem*.

belonged to the testator and was specific : and, in other cases, he imposed an obligation on the heir enforceable by personal action. He assimilated the incidents of legacies with *fideicomissa* and put them on the same footing. All the benefits of each were to attach to the other. If there was any contradiction, the rules of *fideicommissum* were to prevail. He ordained that there should be no restrictions as to persons to whom legacies could be given and removed all the technical restrictions relating to them. He further provided that in the case of bequests to two or more persons, either jointly or severally, the legacy should be divided ; and, in case the share of one legatee lapsed, his portion should accrue to the other co-legatees.

### *B. Restrictions on the Testator's Powers*

Under the Twelve Tables, nothing prevented a testator from bequeathing all his estate by way of legacies, leaving little or nothing to the heir. In such cases, the heir would refuse to accept the inheritance and consequently all the legacies would fail. To obviate this difficulty three statutes were enacted from time to time. The first was the *lex Furia testamentaria* which enacted that no testator could leave more than 1000 *ases* to one legatee, except to certain of his near relatives. This failed to have the desired effect, because this statute placed no restrictions on the number of legacies which a man might create. The second was *lex Voconia* (B.C. 169) which laid

down that no testator could bequeath more to the legatee than to the heir. This too was found quite inadequate, for a testator might defeat its object by increasing the number of legatees. Finally, the *lex Falcidia* was enacted (B.C. 40) by which the heir was secured at least a fourth of the net assets left by the deceased. For example, if A instituted B heir to half of his estate, and C to the other half, and if A imposed no legacies on B, but so many on C as to exhaust or nearly exhaust his share, the *lex Falcidia* would not apply to B because he had already received more than a quarter of the estate. It would apply only to C who would receive one quarter of the half share allotted to him, that is, one eighth.

The legatees would divide the bequests proportionately after deducting the *quarta Falcidia*. For instance, if the net assets left by the testator were only 400 *aurei*, and there were one heir and four legatees, and if the testator gave 100 *aurei* to each one of them thus exhausting the estate, each legatee would get 75 *aurei*, while the heir would get 100 *aurei*.

### (3) FAILURE OF LEGACIES

A legacy might fail in the following cases :

- (1) When the will which created it became ineffectual for some reason or other, e.g., where the heir refused the inheritance.

- (2) When the testator expressly revoked it, either by erasing the disposition or by cancelling it by a subsequent will.
- (3) By implication, e.g., (a) if the thing bequeathed was alienated in the life time of the testator; (b) if subsequently the testator and the legatee became bitter enemies;
- (4) By the death of the legatee before he could claim the legacy;
- (5) For want of *testamenti factio* or the legal capacity on the legatee's part. Gradually the legatee was required to have the same *testamenti factio* as the heir. Hence, the following class of persons could not take a bequest:
  - (i) *Peregrini* and *Latini Juniani*.
  - (ii) Uncertain persons, like municipalities and corporations, of whom the testator had no definite conception.
  - (iii) Until the time of Justinian, posthumous strangers.
  - (iv) The *filiusfamilias* of the heir. But a legacy could be validly given to the heir's *paterfamilias*.
  - (v) After the enactment of the *lex Papia Poppaea* (A.D. 9), unmarried men or women and childless persons were allowed to take only half of what was left to them. The law on the subject was considerably

altered by Justinian's reforms. Justinian repealed the *lex Papia* and he excluded heretics, apostates, children of persons convicted of treason, and the issue of prohibited marriages as well as their parents, from taking any legacy and further he made all legacies to uncertain persons, like corporations, valid. Finally, he made legacies and *fideicomissa* identical.

#### XIX. SPECIFIC LEGACIES AND THEIR INTERPRETATION

"The law of legacy," as Dr. Hunter remarks, "is a law of detail, and cannot well be summarised". We may, however, consider the following examples :

1. A thing belonging to the testator or the heir or originally even property belonging to a stranger, could be given as legacy, provided the testator was aware that it was owned by such person. In that case the heir was bound to buy it from the third party, or in case it could not be purchased, the heir should pay the legatee its value.

2. If the legacy was already pledged to a creditor, the heir was under an obligation to redeem it and to convey it to the legatee, provided the testator knew it was so pledged and not otherwise.

3. If a testator bequeathed an article which at the time of making the legacy belonged to the legatee, it was void. It would be void, even though the legatee

parted with the thing before it became due, for the rule was that legacy void at the time of making the will was void for ever. But, if the article really belonged to some third person and the testator thought by mistake that it belonged to the legatee, then it would be valid. Again, it would be valid, if the testator left property belonging to him to the legatee, thinking by mistake that it belonged to a stranger.

4. If a testator bequeathed a legacy and subsequently pledged or sold it, the legatee would take nothing if the testator really intended to revoke the grant. If not, the legatee could claim it, or its value, from the heir.

5. In case the testator bequeathed to his wife some money equal to the value of her *dos*, the legacy was good. For, even though he was only returning the amount due to her on the dissolution of the marriage, it would be more advantageous to her to take it as a legacy since it could be claimed immediately on her husband's death, for the heir was given a year for the restitution of the *dos*.

6. If a testator bequeathed a certain sum of money to his creditor, the legacy was good, provided the amount so given exceeded the amount due to him. It would also be valid if it was unconditional while the debt was either conditional or was payable at some future time. If not, it would be invalid, the principle being, that for a legacy to be valid it was essential that the legatee should gain something by it.

7. In case the thing bequeathed became the property of the legatee in the life-time of the testator, the rule was that the former could claim the value of the article from the heir, if he had purchased it, but if on the other hand he had acquired it as a gift, he could not recover its value.

8. A mistake made by the testator either in describing the subject of a legacy or in alleging an erroneous reason for giving it, would not invalidate it, e.g., if a testator were to say, "I give my house to my cousin Cornelia, because she attended on my illness", but if, in fact, Cornelia, never served him, even then it would be valid because there is no vital mistake as to identity of bequest or beneficiary, nor is there any *condition* which has to be performed. But a person could of course assign a reason under a conditional form and in that case the legacy was only valid if the condition had been fulfilled.

## XX. LEGACY AND DONATIO MORTIS CAUSA

*Donatio Mortis Causa*<sup>1</sup> may be defined as a "gift made in contemplation of death either generally or in view of a particular illness or hazard". In other words, the donor may stipulate with the donee that in case he survived, the gift is not to take effect. Its peculiarity is that it could be revoked at any time by the donor, and that delivery of possession was essential to the donee. In Justinian's time, it had to be

<sup>1</sup> *Donatio*—gift; *Mortis*—of death; *Causa*—in anticipation of.

evidenced by five witnesses. Justinian, however, fused the law of *donatio mortis causa* with legacy, and in his time there was not much difference between the two. There were only two points in which they differed : (1) in *donatio mortis causa* the gift took effect at once on the death of the donor and the donee was not concerned as to whether the heir accepted the inheritance or not, because he took it directly from the donor and not through the heir, but a legacy depended on the acceptance of the inheritance by the heir. (2) A *filiusfamilias* could make a valid *donatio mortis causa* with the consent of his father as to his *peculium profectitium*, but he could not give it by way of legacy.

#### XXI. CODICILS

Codicils may be defined as "informal testamentary dispositions". They were given legal effect by Augustus for the first time. They were originally introduced for the convenience of travellers, as it might be difficult to make a formal will while travelling. Again, the technicalities involved in the act of will-making were so great that two devices were found which ultimately superseded wills. They were (a) Codicils and (b) *fideicommissa* or trusts.

(a) Codicils were mere requests or directions, otherwise called *fideicommissa*, addressed to the heir, which were binding upon him. The heir might be appointed under a will, or he might be *ab intestato*. In

the case of the latter, he was bound to carry out the instructions in the codicil as trustee for the beneficiaries named in it. Formerly, five witnesses were required to evidence a codicil, but the rule was not always strictly observed.

The chief points of difference between codicils and wills are :

- (1) A person could leave only one will, where as he could leave as many codicils as he pleased.
- (2) A will required a certain technical form to make it valid, such as signing and sealing by seven witnesses, but a codicil needed no such formality, until Theodosius II enacted in A.D. 424, that it should be evidenced by five witnesses.
- (3) To make a will the testator had first to disinherit his heirs expressly. This could not be done by a codicil; it could be done only by a will.
- (4) A will was void if it violated the rule as to *legitima portio*, but this principle did not apply to a codicil.
- (5) Strictly speaking, no person could be appointed heir by means of a codicil. This was originally the cardinal point of difference between the two; for the main function of a will was to appoint an heir. All other things were unessential and subordinate to it. The

instructions in a codicil could not be executed unless there was an heir, created either by a will or *ab intestato*, in possession of the estate.

- (6) A tutor could not be appointed by codicil, unless such appointment was confirmed by a will subsequently made by the testator.

Codicils were the means by which *fideicomissa* were generally created. And thus persons, who otherwise could not be benefited by testamentary dispositions owing to some disability imposed by the Civil Law, were provided for by means of these dispositions. Ultimately they became so popular that, when testators made wills, they usually ended with a clause called *clausula codicillaris*, by which, if the document failed as a will owing to some technical defect, it operated as a codicil.

#### XXII. FIDEICOMISSA OR TRUSTS

*Fideicomissa* may be defined as requests made to the heir in a will or to the heir *ab intestato* to carry out the directions of the deceased in respect of his property. They were largely used even prior to the Imperial period, but then the heirs were not under a legal obligation to carry out the instructions of the testator. Hence, during the Republican period, *fideicomissa* were dependent entirely on the good sense and honour of the heir to whom they were addressed.

That is the reason why they were called trusts because the deceased put his trust in the heir who he hoped would carry out his wishes. They became legally binding from Augustus' time from the period when codicils came to be recognised as informal wills, and they were closely connected in their history. Like codicils, *fideicommissa*<sup>1</sup> became ultimately so popular that a special praetor was appointed to deal with them.

They were created in the following ways :

- (1) By a will. In this case the trust had to be executed by the heir mentioned in the will.
- (2) By parole, or by writing either with or without witnesses.
- (3) Ordinarily by a letter addressed to the trustee.

In the last two cases, the heir *ab intestato* should carry out the trust.

The chief object of *fideicommissa* was to enable persons who had no *testamenti factio*, for example, the *Latini Juniani*, aliens, etc., to become beneficiaries or legatees; but it was essential that the founder of the *fideicommissa* should have *testamenti factio* for the rule was that no person could create a valid trust who could not make a valid will. "The *fideicommissum* was a contrivance to surmount some of the technicalities of the Roman Will. It was a request to the heir to make over the property or part of it to some other

<sup>1</sup> The author of *fideicommissa* might direct the trustee i.e., his heir, either to give the whole inheritance or a part of it to a particular person.

person not qualified to take as heir or legatee at civil law. Thus a *peregrinus* (who might actually be the child of the testator, if he had married a *peregrina*) could not be heir or legatee, but for a considerable period of time he was allowed to take by way of *fideicommissum* and this, according to Gaius, was the principal reason for the introduction of *fideicomissa*".

The chief points of difference between a will and *fideicommissum* are as follows :

1. By a *fideicommissum* even persons who had no *testamenti factio* could be appointed beneficiaries, although this power was much curtailed subsequently by the legislation of Hadrian, but in a will the rule as to *testamenti factio* was always strictly observed.

2. The formalities required to create a will were dispensed with in a *fideicommissum*, for the latter could be created by means of signs without spoken words and even by a nod of the head, and further a trust might be in any language, whereas a will originally had to be in Latin, and it could not be created by means of signs. But *fideicomissa* were usually contained in a will or codicil, which in Justinian's time had to be evidenced by seven and five witnesses respectively.

3. A woman could always be appointed beneficiary in a *fideicommissum*, but not in a will, as for instance, in certain cases under the *lex Voconia*.

4. A series of life estates and vested remainders could be created by a *fideicommissum*, but not by a

will; for example, a person might say, let my estate devolve on X for life, on Y for life, on Z for life, and the remainder to A, B, and C.

The following three important statutes which were enacted during the Imperial period may be now considered:

1. *S. C. Trebellianum* (about A.D. 56).
2. *S. C. Pegasianum* (about A.D. 75).
3. *S. C. Trebellianum* (enacted in Justinian's time).

The main object of these enactments was to induce the heir to accept the inheritance left by the testator, otherwise, the will would fail for want of an heir, and consequently the directions contained in the will could not be effective; for, the heir being a universal successor, had to pay all the debts of the deceased, while the other beneficiaries, who were not heirs, received the benefits without sharing the obligations as to the testator's debts. This worked a hardship on the heir and hence where the heir had to hand over the whole or part of the inheritance to a beneficiary, he protected himself against the liabilities by stipulating with the latter that the beneficiary should also agree to proportionately share with him the debts of the deceased. In other words, if the heir got only half the estate, the liabilities had to be shared equally between them. Such stipulations between the heir and the beneficiary were called *stipulationes partis et pro parte*. The *S. C. Trebellianum* (A.D. 56) made such an agreement unnecessary. The testator's creditor

could henceforth sue the beneficiary directly as to the latter's share in the estate. This statute was enacted in order to induce the heir to take up the inheritance. But, in some cases, even this was not found a sufficient inducement. Therefore the *S. C. Pegasianum* was passed. This conferred on the heir the right to take one fourth of what he would have taken had the testator died intestate as in the case of *lex Falcidia*. Therefore on the analogy of the *quarta Falcidia*, the portion taken by the heir under this act was called *quarta Pegasiana*. But the defect in this regulation was that the heir became liable for all the claims against the estate if he availed himself of it. He had, therefore, to enter into a contract of indemnity with the beneficiary, as he did before the *S. C. Trebellianum* was enacted.

The following is an example of the position in which the heir might be placed :

A appointed B, his heir, and charged B, by way of trust to hand over the inheritance to C. In this case B would have to pass it on to C but he would be legally responsible for the debts of A, the testator. B, protected himself by entering into an agreement of indemnity in respect of claims on the estate. Under the *S. C. Trebellianum*, such a stipulation was unnecessary. C stepped in the place of B, the heir, and, if B was sued by A's creditor, he might plead the statute in defence. Subsequently, the *S. C. Pegasianum* enabled B, the heir, to take a quarter of the inheritance but then he was liable for A's debts and, therefore, B had to enter into an agreement *partis et pro parte* with C,

according to which C consented to share proportionately A's debts.

In Justinian's time, however, another statute bearing the same name *S. C. Trebellianum* was enacted which combined the two previous statutes. It laid down that henceforth (1) the benefit and the burden should in all cases be rateably divided between the heir and the beneficiary, (2) the heir was in all cases entitled to retain a quarter of his share as under *S. C. Pegasianum*, (3) the heir could not refuse to take the inheritance.

### XXIII. THE ENGLISH LAW OF WILLS

In England by the Wills Act 1837, as modified by the Wills Act 1861, any person who has attained his twenty-first year and is of sound mind may bequeath all his moveable and immoveable property by will executed as required by the Act. Under the Act, it is essential that the will should be in writing, signed by the testator at the end of the document in the presence of at least two witnesses, both of whom should be present at the same time.

In English Law, unlike Roman Law, there is no rule, limiting the power of the testator to leave a certain portion of his property in favour of his family and kindred. For, in the absence of a contract to the contrary, any man can by will bequeath all his real and personal estate to strangers, ignoring his wife and children. Further, in English Law a will is revoked

by the marriage of the person making it. Subject to this exception, a will can only be cancelled by another will or codicil or by the testator repealing or destroying it with the idea of revocation.

#### XXIV. THE HINDU LAW OF WILLS

Under Sec. 63 of the Indian Succession Act, every will made by a Hindu after January 1, 1927, must be in writing signed by the testator and executed as required by the Act. The following main principles may be noticed here :

1. Any one who is a major under the Indian Majority Act, (that is eighteen or twenty-one as the case may be) may make a valid will.
2. Any person whether a minor or an insane person may be a beneficiary under a will.
3. A Hindu cannot dispose of all his property by will, as for example, ancestral property. Generally speaking, he could bequeath all his separate or self-acquired property, provided he has made an adequate provision for the maintenance of his wife.

#### XXV. THE MUSLIM LAW OF WILLS

Any Muslim who has attained age under the Indian Majority Act may make a valid will disposing

of any of his or her property whether moveable or immoveable, self acquired or ancestral, the only qualification being that, ordinarily, he could not dispose of more than one-third of his net assets. Further, under the Sunni Law, a testator could not make any bequest in favour of a person who might be his heir at the time of his death. Under the Shia Law, however, the testator may give not more than one-third of his property to an heir.

#### XXVI. THE ROMAN LAW OF INTESTATE SUCCESSION

Intestate Succession may be defined as succession to a person who has died without leaving a will or who has left a will which is not valid. Under the Twelve Tables, it was regulated in the following manner on the basis of *patria potestas*.

All heirs were divided into three classes, namely,

(1) *Sui heredes*; (2) *Agnates*; and (3) *Gentiles*

(1) *Sui heredes*. The first group excluded the second, and, similarly, the second, the third. In other words, so long as there was any member of the first group alive, no member of the second group could take the inheritance and so with regard to the third. Taking *sui heredes* first, these were the children or grandchildren under the *potestas* of the father who became *sui juris* on his death. The sons and daughters took equal shares in the property. Adopted children and the wife *in manu* shared equally with the *sui heredes*.

If, for example, X died leaving the following heirs, A (son), B (son), C (daughter), D (wife), they would divide the estate equally.

If A died in the life-time of his father leaving E, his son, the latter would take the share which his father would have taken had he been alive, i.e., one fourth. That is to say the division was *per stirpes* and the principle of representation was recognised. An emancipated child and a married daughter (*in manu*) were excluded from inheritance for the simple reason that they were not agnatically related to the deceased.

(2) *Agnates*. Failing the *sui heredes*, the nearest agnates (*agnati*) were entitled to the inheritance. They "formed a wider group, having the same centre, but a larger circumference". The principle of division was as follows :

(i) The nearer in degree in relationship excluded the more remote, for example, if a person died leaving a brother and a brother's son, the brother would exclude the brother's son.

(ii) Those who were in equal degree of kinship took equal shares. For example, if the heirs were two brothers and two sisters, each took a quarter of the inheritance.

(3) *Gentiles*. Failing the *agnates*, the *gentiles* took the estate. The rules of inheritance among them are too complicated and obscure to be noticed here, and further the succession among the *gentiles* became

obsolete by the time of Gaius. In Lord Mackenzie's words,

"Gaius has pointed out the harshness of the rules of intestate succession in the Twelve Tables. A son not under power from having been emancipated, or from any other cause, could not succeed, because he was not in the family and no longer among the *sui heredes*. So agnates who underwent a change of state lost agnation and along with it the right of succession. Female agnates, other than sisters, could not succeed. Finally, cognates or relations by women were wholly excluded, so that even the mother, who was not *in manu mariti*, did not succeed to her son and daughter, and her son and daughter did not succeed to her."

In course of time the praetor changed these rules tempering the harshness of the *jus civile* by introducing two chief innovations. Firstly, he enacted that emancipated children should succeed along with *sui heredes*. He extended the same privilege to the wife not *in manu* and the husband, who, originally, could not succeed to each other, as they were not agnatically related. To quote a learned writer "There was a *collatio bonorum* (a bringing together of goods), the property of the emancipated being brought into common stock with the father's estate, to be shared among all the children. Thus, if a father left five children, two of whom he had emancipated during his life, while the other three became independent by his

death, they all shared alike, receiving each a fifth of his estate. But observe that only the last three were called heirs : they alone were made so by the laws, and the praetor did not presume without authority of law to make anybody heir. The other two were only *bonorum possessores*, actual holders of their shares in the estate, and allowed to sue and be sued as if they were heirs ”.

The second great reform the praetor introduced was that he permitted cognates (more distant blood relations) to share in the succession after the agnates. Briefly the effects of the praetorian reforms were these :

- (1) All the children of the deceased, whether emancipated or not, were primarily entitled to a estate.
- (2) Next came the agnates other than those comprised in group one.
- (3) Lastly, the cognates, i.e., all blood relations other than those comprised in the above classes.

In the Imperial period two important statutes were enacted on this subject :

- (1) The *S. C. Tertullianum* (A.D. 158) enabled a freeborn woman who had three children or a freed-woman who had four, to succeed as heirs to their children.
- (2) And, conversely, the *S. C. Orphitianum* (A.D. 178) permitted the child to succeed to its mother.

## THE LEGISLATION OF JUSTINIAN

*Novels 118 and 127*

Justinian aimed at simplifying the law of intestate succession by introducing the principle of blood-relationship in the place of agnatic relationship on which the old law was based. He divided all heirs into four classes, namely (1) descendants of the deceased ; (2) ancestors of the deceased ; (3) half brothers and sisters, consanguine and uterine, and their descendants ; (4) all other collateral relations. The first group excluded the second, and the second the third, and the third, the fourth.

## CLASS (1): DESCENDANTS OF THE DECEASED

Rule 1. A person's estate was divided equally among his legitimate children, males and females taking equally. If the deceased left only one child, it took the whole property. Among the descendants of the deceased, the rule was that the nearer relation excluded the more remote, e.g., if a man died leaving A and B, (A's son), A would exclude B. The succession was *per stirpes*. That is to say, the descendants of a predeceased son or daughter would take the share which their father would have taken had he been alive. For example, if a person died leaving A, a son, and C and D, grandsons by his predeceased son B, the estate would be divided into two shares, A taking one share, and C

and D taking the other in equal shares as representing their father.

#### CLASS (2) : ANCESTORS

Failing descendants, the father and mother and other ancestors excluded all other collateral relations excepting brothers and sisters of the whole blood and the children of deceased brothers and sisters, the principle of division being, that the nearer relation excluded the more remote, *e.g.*, father would exclude father's father.

#### CLASS (3): COLLATERALS

Under this heading were comprised (*a*) brothers and sisters of the full blood and (*b*) half-brothers and sisters. Rule (*i*). In each of the above groups, the heirs in the same degree took equal shares. Rule (*ii*). In each of these groups the principle was that the nearer relation excluded the more remote. Rule (*iii*). Full blood excluded half blood: hence group (*a*) would exclude group (*b*). Rule (*iv*). Among brothers and sisters of the whole blood as well as the half blood, succession was governed by the doctrine of representation.

It may be added here that in the Roman Law of succession there is no distinction made between real and personal property, primogeniture is disregarded; and males and females take equal shares.

## XXVII. THE ENGLISH LAW OF INTESTATE SUCCESSION

Before the passing of the Law of Property Act 1925, a man's estate was divided into two classes namely, real and personal property, and there was a vital distinction between the two, for, if a man died intestate before that date, his real estate descended to his heir-at-law, while his personal estate passed to his next of kin. If the deceased left an eldest son, he was the heir-at-law, his wife and children constituted the next of kin. This statute has practically abolished this distinction and, in case of intestacy, all property, whether real or personal, is now divided among the next of kin, and the heir-at-law enjoys no special privilege.

At the present day, the succession among the next of kin of an intestate is regulated by the provisions of the Administration of Estates Act, 1925, under which all the property of a person vests in his personal representatives on trust for sale, the proceeds after payment of debts, to be divided among his nearest relatives. If the deceased leaves issue, the surviving spouse is entitled to all personal chattels, a first charge of £1,000, and a life interest in half the residue. The half undisposed of, and the future interest in the other half, are held in trust for all the children (male and female) equally, a deceased child being represented by his or her children. If the intestate leaves no issue, his parents are entitled; if no parents, the brothers and sisters; then the grand-parents; then uncles and

aunts or their issue ; and failing all these, the surviving spouse takes absolutely. If none of these persons exist, the property (real and personal) goes as *bona vacantia* to the Crown.

#### XXVIII. THE HINDU LAW OF INTESTATE SUCCESSION

In a Hindu joint family the devolution of ancestral property is governed by the principle of coparcenary and survivorship. The law of inheritance and succession applies only to the self-acquired property of a Hindu or that which he has acquired on partition from his coparceners or to property held by him as a sole surviving coparcener. The rules vary according to whether a person belongs to a *Mithakshara* or the *Dayabhanga* School of Hindu Law.

#### XXIX. THE MUSLIM LAW OF INTESTATE SUCCESSION

There are two schools of Muslim Law (1) Sunni and (2) Shiah. Among the Sunnis agnates are preferred to cognates, whereas in Shiah Law agnates and cognates take together. No distinction is made between real and personal property or ancestral and self-acquired property. Secondly, males usually take double the share of females, e.g., if a person dies leaving a son and daughter the son will take two-thirds and the daughter one-third of his property. Thirdly, the principle, the nearer in degree excludes the more remote is generally applied, e.g., son will

exclude the son's son. Fourthly, full blood excludes half blood.

The law of inheritance and succession among the Hindus and Muslims is quite complicated and it is not possible to summarise the law within the orbit of a paragraph. Let us take, however, one simple example to illustrate how the two systems work out in actual practice. Let us suppose a person leaves a son, a daughter, a brother and a sister as his heirs. Both under the Sunni and Shiah Law, the brother and sister will take nothing, while the son will take two-thirds and the daughter one-third. In Hindu Law the son will take the whole property to the exclusion of daughter, brother, and sister. The daughter is not entitled to take any share. She has only the right to be maintained until marriage.

## BOOK III

### THE LAW OF ACTIONS

#### I. INTRODUCTION

THE Roman Law of Actions corresponds to the modern law of civil procedure, by which a person is enabled to set the law in motion in order to enforce his rights. In the language of scientific jurisprudence, civil procedure is adjective law as distinct from substantive law which merely defines rights and duties. The study of the Roman Law of procedure is mainly of historical value. In Dr. Hunter's words,

"The history of Procedure is, in one word, the history of the efforts of the State to control the transactions of men. It is the history of the growth of jurisdiction. At first the right of the State to interfere in private quarrels is not recognised; but later on, the Roman magistrate appears in the guise of a voluntary arbitrator, a character that insensibly changed into a compulsory arbitrator."

## HISTORY OF ROMAN CIVIL PROCEDURE

There were three divisions in the history of the Roman Law of Actions<sup>1</sup>.

- (1) The first and earliest in point of time was the system of the *legis actiones* which flourished during the Republic.
- (2) The formulary procedure. This began under the Republic, and flourished during the early Empire.
- (3) The extraordinary procedure was the last to evolve and the last to survive.

The first step in procedure was to summon the defendant before the court. At the time of the Twelve Tables, it was the duty of the plaintiff to get the defendant before the court in any way he could, "The process is prescribed by the Twelve Tables in the terse staccato language characteristic of this enactment :

If he calls him to Court, he must go ; if he does not go, call witnesses : then seize him : if he evades or flies, lay hand on him ; if he is sick or old, give him a vehicle : if he does not choose, need not provide a carriage ". In course of time, however, the praetor, enacted that refusal to obey summons was an offence and also to rescue or aid and abet the escape of a person who was summoned to court. From the later Imperial period summons was served on the defendant by a public officer who gave to the former a statement

<sup>1</sup> The word action is derived from *agere*, to act. It means either—(1) the right to put the law into motion; (2) or putting the law into motion.

in writing giving a brief and accurate statement of the demands of the plaintiff.

For a long time in Roman legal history the principal judicial officer, the praetor, never tried the case himself. When the parties appeared before him, he ascertained the points of dispute between them and referred the case to a single Judge (*judex*) or to a board of judges (*recuperatores*) or to a standing college of judges (*centumviri*). It may, therefore, be said that, until the time of Diocletian, there was no true civil court in Rome, for until his time a civil trial was practically a reference to arbitration in which the praetor referred the matter for trial to arbitrators, who were not lawyers but laymen.

The *legis actiones* resembled the formulary system to some extent. There were in both the systems two stages in the course of a law suit—first, the settlement of the issues before a Roman Magistrate, when the suit was said to be *in jure*, and secondly, when the matter passed into the hands of the *judex*<sup>1</sup>, “court-referee,” when it was said to be *in judicio*.

## II. LEGIS ACTIONES<sup>2</sup>

*Legis Actio* means an action of the law which consisted in employing solemn symbolical forms with

<sup>1</sup> A *Judex* was an arbitrator. He, in Dr. Hunter's words, "was not a lawyer; he was not paid; he was compelled to act if duly selected; and he was called in for a single case only". He might be any person chosen by the parties themselves, out of a panel consisting originally of senators, but later varying with political changes.

<sup>2</sup> They were called *legis actiones* either because they were legal in origin as opposed to praetorian, or because the forms of procedure were as formal,

oral expressions. That is, it was a formal ceremony, beginning before a magistrate and ending before a *judex*.

Their chief characteristics were :

- (1) They were open only to Roman Citizens.
- (2) The parties were obliged to appear personally before the magistrate, or the *judex*, as the case might be.
- (3) The proceedings here were extremely rigid and formal.
- (4) If the suit was once brought, there was an end of the matter. No further action could be taken, even if the plaintiff had lost his cause on the most technical ground.
- (5) Generally speaking, the plaintiff could not demand pecuniary damages ; he could only claim restitution of the thing in dispute.

There were five kinds of these actions<sup>1</sup> :

- (i) *Actio sacramento* ;
- (ii) *Judicis postulatio* ;
- (iii) *Condictio* ;
- (iv) *Manus injectio* ; and
- (v) *Pignoris capio*.

rigid, and exclusive as the laws themselves, e.g., if a man used the word *vites* (vines) for *arbores* (trees) in a suit for damages to a vineyard, the plaintiff lost the action.

<sup>1</sup> Among these the first three were forms of procedure and the last two were modes of execution.

(i) *Actio Sacramento*

It was the principal *legis actio* and was the oldest form of procedure. It was generally applicable to all things for which the law had not given a special action. It simply meant a proceeding in which the *bona fides* of the parties was secured by requiring each person to deposit a sum of money<sup>1</sup> with the college of *pontifices*, and it was agreed that the losing party should forfeit his stake (*sacramentum*) to the State for the service of public worship. In this action it was necessary that the subject of dispute should be brought before the Court. If, for example, the plaintiff was claiming a slave, he should be brought before the praetor. In the case of immoveable property, like land, a portion of the soil should be brought before the Court and, if it was a house, a brick or tile was enough. "If the thing was of such a character that it could not conveniently be carried or brought into Court; for example, if it was a column or a ship, or a herd or flock, part of the whole was taken and brought into Court, and then vindication was made of the part as if the whole had been present in Court; thus a single sheep or goat from the flock was brought into Court, or a hair from an animal was taken and brought into Court".

As soon as the litigants were present, the plaintiff started the proceedings by claiming the

<sup>1</sup> This sum varied from 50 to 500 *ases* according as the sum in dispute exceeded 1000 *ases* or not.

article as his own with symbolic gestures. The defendant also in his turn repeated the words and actions of his opponent. The praetor then intervened and asked the parties to let the thing go. Thereupon each challenged the other for a wager in money in case he lost the case. The praetor at this stage went into the merits of the case and gave interim possession to one of the parties and the other party was allowed to figure as plaintiff before the *judex*, and, curiously enough, the latter was not asked to determine which of them was the owner but which of the parties was right in his wager. As Dr. Hunter remarks, "in this short drama, which formed the prelude for many years to every Roman action, we cannot fail to perceive the true origin of civil jurisdiction." In short, it was "based on a mock combat," in which the parties pretended voluntarily to refer to arbitration.

### (ii) *Judicis Postulatio*

Little is known about this form of procedure. It appears to have consisted of a set formula addressed to the magistrate for the immediate appointment of a *judex*.

### (iii) *Condictio*

It was a form of action introduced by the *lex Silia* (date uncertain). This action derived its name from *condictio*, a word meaning formal notice which the

plaintiff gave to the defendant to appear thirty days later before the magistrate for the appointment of a *judex*. The chief points of difference between *sacramento* and *condictio* were : (1) whereas in *sacramento* the wager was forfeited to the State, in *condictio* it was forfeited to the successful party ; (2) *sacramento* comprised both real and personal claims while *condictio* was applicable only to claims *in personam*.

#### (iv) *Manus Injectio*

It was only a form of execution of judgment consisting of the bodily seizure and imprisonment of the person of the debtor in the creditor's house, and if the debtor failed to pay within sixty days, the creditor could sell him as a slave.

#### (v) *Pignoris Capio*

This was also, like *manus injectio*, another mode of execution of judgment, that is by distress or seizure of the property of the debtor in certain exceptional cases.

The *legis actiones* became gradually replaced by other forms of actions which were less formal and better adapted to the more advanced conditions of Roman society. In Buckland's words,

"The *legis actio* was not suited to a developed civilization. It lasted too long, partly because of its value to the patricians, partly because much of

it was prescribed by the XII Tables, long regarded as a fundamental unchangeable law. In the third century B.C. its value to the patricians disappeared since, partly as a result of publication of the *arcana*, by Gnaeus Flavius, partly as the result of the admission of plebeians to the pontificate . . . there was no longer any secret. The inconveniences remained with no advantages."

Therefore it was gradually superseded as a result of two statutes a *lex Aebutia* of about B.C. 150 and a *lex Julia* of about B.C. 18. It is said that until the enactment of the latter, the parties were allowed to choose between the systems of *legis actiones* and the formulary procedure and that the second statute superseded the *legis actio* in almost all cases.

### III. FORMULARY PROCEDURE

Originally, the formulary procedure was introduced by the *praetor peregrinus* for foreigners. Later, it was made available by the *lex Aebutia* for Roman citizens also and was administered in the court of the *praetor urbanus*. It was in two respects distinctly better than the *legis actiones*. First, it was free from "sacramental and mysterious formality". Second, it was infinitely more elastic and could be adapted so as to give effect to any claim which the *praetor* considered equitable.

This procedure, which superseded the *legis actiones*, was named after the formula which the magistrate

handed over to the *judex*. The parties appeared in person as before but the old ceremonials were replaced by arguments addressed to the magistrate *in jure* and he delivered a written formula to the *judex* who delivered judgment on the merits of the case. This division of an action between the magistrate and the *judex* was called the *ordo judiciorum*.

The praetor decided whether the plaintiff had made out a *prima facie* case against the defendant; and if he had, he proceeded to make a formula consisting of a short written decree appointing a *judex* and briefly stating the facts of the case and the issues to be tried. He gave this formula to the plaintiff in the presence of the defendant who, if he had any defences against the plaintiff's claim, might have them included in the formula. The suit was then said to have reached the stage of *litis contestatio* or the joinder of issue. The *judex* was bound to decide the case strictly in accordance with the written instructions in the formula. His decision was called *sententia* against which there was no appeal. Usually a litigant was able to find a stereotyped formula appropriate to his case in the albums containing the praetor's edicts. If not, the praetor had the power to draw up a new formula.

The principal parts of a formula were *demonstratio*, *intentio* and *condemnatio*.

First, there was the "*demonstratio*" which consisted of the statement of facts. Next, there was the "*intentio*". It contained a statement of the plaintiff's

claim. All the defences open to the defendant were placed in the "*intentio*". These defences were called "*exceptiones*". Again, any countervailing facts could be alleged by the plaintiff in reply, which were called "*replicatio*", and the defendant in his turn might file his statement in answer to *replicatio*, which was called "*duplicatio*" and so on. The last part of the formula was called the "*condemnatio*", which empowered the *judex* either to condemn or acquit the defendant. But sometimes there was another part added to the formula<sup>1</sup> called "*adjudicatio*" in suits for partition of property held in common.

#### DIVISIONS OF ACTIONS

The following were the most important divisions of actions under the formulary system :

(1) (a) *in rem* and (b) *in personam*.

An action *in rem* was called *vindicatio* which was a legal proceeding instituted to enforce a right to a thing. An action *in personam* was called *condictio* which was merely a suit to enforce an obligation against a person. *Vindicatio* and *condictio* differed in their respective formulas in respect of the *intentio*.

(2) (a) *Bonae Fidei*, (b) *Stricti Juris* and  
(c) *Arbitrariae*.

<sup>1</sup> The following is an example of a formula. "Let X be *judex*. If it appears that A deposited with B., a silver vase, and that, by the fraud of B., it has not been given back to A., whatever turns out to be the value of the article, that sum of money, *judex*, condemn B. to pay A. If it does not so appear, acquit him."

(a) *Bonae Fidei*: e.g., *emptio venditio* or consensual contracts generally. In these actions the judge was allowed to take equitable considerations into account, such as fraud, mistake, etc.

(b) *Stricti Juris*: Here the judge had no discretion except to pass judgment according to the strict letter of the law.

(c) *Arbitrariae*: In these, the judge issued an order to the defendant for specific performance called *arbitrum*, and he was allowed considerable latitude in fixing the amount in *condemnatio*. The judge ordered that a thing should be restored or produced and that a contract should be specifically performed, failing which, the defendant was to pay compensation according to the circumstances of each case.

(3) (a) *in jus conceptae* and (b) *in factum conceptae*.

(a) Actions *in jus conceptae* were based on the *jus civile*. In these, the formula contained an assertion of a legal right *in rem* or *in personam*.

(b) Actions *in factum conceptae* were created by the praetor. In these the formula was on an allegation of fact and the judge was directed to decree or dismiss the plaintiff's suit according as he found the facts proved or not.

(4) (a) *directa*, (b) *contraria*, and (c) *utilis*.

(a) The action *directa* was available to the party having the principal interest in a *bona fide* and bilateral transaction. i.e., an action against a tutor by his pupil.

(b) The action *contraria* was available to that party having the subordinate interest in a *bona fide* and bilateral transaction, e.g., an action by a tutor against his ward.

(c) The action *utilis* was given in cases where legal fictions were employed, e.g., the fiction that the defendant had not suffered *capitis deminutio* which, in fact, he had. This action was also employed to denote modified or analogous actions given by the praetor, where the facts were similar to those of another case for which an action was provided by the civil law, e.g., an action in which the plaintiff was allowed to represent that he was within the scope of the unextended action, and similarly the legal fiction by which a foreigner represented himself to be a Roman when he was allowed by the praetor to take part in an action recognised only by the civil law.

#### PLUS PETITIO

We may now consider the rule as to *plus petitio* which occurred in cases where the plaintiff claimed more than was due to him. This might happen in any one of four ways.

(1) *Re* : in respect of the subject matter, where a larger amount was claimed than was due, e.g., five hundred *ases* instead of a hundred.

(2) *Tempore* : in respect of time, as where a person sued in January for a debt due in April.

(3) *Loco*: in respect of location, where the plaintiff sued in one place, while the defendant had promised to pay in another e.g., the promise was to pay at Florence and the suit was instituted at Naples.

(4) *Causa*: as regards the cause of action, e.g., where the defendant had promised purple and the plaintiff sued for Tyrian purple.

Originally, the effect of an excessive claim was that the plaintiff lost his action. By a constitution of Zeno, it was enacted that in *plus petitio tempore*, the plaintiff should not lose his case, but should be prevented from going on with it for double the time he ought to have waited, and until the costs engendered by his abortive action were paid. Later, Justinian provided a similar concession for other excessive claims also by compelling the plaintiff to pay the defendant thrice the amount of expenses, occasioned by his extravagant demand.

*Plus petitio* arose only in cases of actions *stricti juris* and where the demand was for a certain amount. There was no risk of *plus petitio* in actions *bona fide* or where it was for an uncertain sum. Further, the suit was affected only where the excessive claim was in *intentio* but not if it was in *demonstratio*.

Again, where a plaintiff's demand was less than what was due to him originally the plaintiff was precluded from suing the defendant on the same cause of action during the same praetorship. But Zeno exempted the party from bringing a fresh action and

authorised the judge to decree the suit in its entirety, although the claim related only to a part.

Prior to Justinian, in case the plaintiff claimed the wrong thing, the rule was that he lost his action but he might sue again. Justinian, however, allowed the plaintiff to amend his plaint on the condition that he paid the costs of the other party.

#### LITIS CONTESTATIO

In civil procedure, the moment when a contested right was to be regarded as really made the subject of litigation was important, for the party who ultimately won the case was entitled to all that accrued to the thing in dispute from that time. If the matter had reached the stage in a suit when the praetor could appoint a *judex*, i.e., at the conclusion of the proceedings *in jure*, it was said to have reached the stage of *litis contestatio*. It was a turning point in the case, for if once the proceedings reached this stage, they could not again form the subject of litigation.

The formulary system of procedure had two defects. First, it was "rude and imperfect". Second, "it conveyed the slightest possible information to the defendant, and scarcely took more than the first step in eliminating the real issue between the parties. This—the true end of all pleading—was thus most inadequately accomplished during the golden era of Roman Jurisprudence".

## INTERDICTS

*Interdicts* may be defined as the "formal pronouncements of the praetor ordering something or prohibiting something". They may be classified into (1) prohibitory, (2) restitutory, and (3) exhibitory.

(1) Prohibitory interdicts were those which prevented something from being done, as for example, prohibiting building on sacred ground, or doing something which might impede navigation in a public river.

(2) Restitutory interdicts were those which ordered a person to restore something, as for instance, to order that some person who has been violently dispossessed of land should have it restored to him.

(3) Exhibitory interdicts were those which commanded a person to produce something, as for example, to order a person whose freedom was in question to be produced before a magistrate.

Speaking about restitutory or possessory interdicts, the following may be specially mentioned; (1) *uti possidetis*; (2) *utrubi*; and (3) *unde vi*. They were intended to protect *bona fide* possession of property. In other words, a person in possession has a right to continue unless some one else can show that he has a better right to possess.

(1) *Uti possidetis* was granted in respect of immoveable property. The person who was in actual possession was declared to be the present possessor, provided he had not got it, *vi, clam, or precario* i.e., by force, stealth, or as a tenant at will. It is interesting

to notice that the whole proceeding is 'double'; there is no plaintiff and no defendant, and interim possession during the settlement of the point at issue has thus to be given to one or other, but the thing to be decided now is simply that of the actual possession and it does not in any way prejudice further proceedings as to the right of ownership. As Dr. Lee remarks,

"The double interdicts—*uti possidetis* and *utrubi*—involved a further complication. These were usually employed to determine which of the parties was to have the advantageous position of defendant in an action brought to vindicate the property, in other words to determine who was entitled to be maintained in possession. Since both claim to be so, neither can be regarded as plaintiff or defendant rather than the other; and so, as Gaius puts it, the praetor uses the same languages to both, forbidding each to do violence to the kind of possession which the interdict is designed to protect".

(2) *Utrubi* applied to moveable property. In this case, the party in possession must prove that his possession has been *bona fide* during the greater part of the preceding year.

(3) *Unde vi*. This was an interdict for recovering possession, when a person was violently ejected from lands and buildings. Here, a person who was the owner forfeited it, and if he was not the owner, he should return it, and also pay to the wronged party its estimated value. Thus, the forcible seizure either

of moveable or immoveable property was always severely repressed by the Roman Law.

With the suppression of the formulary procedure, as mentioned elsewhere, interdicts were replaced by actions. Therefore, in Justinian's time they were obsolete, there being no difference between them and actions.

#### *IN INTERGRUM RESTITUTIO*

Like interdicts, *in integrum restitutio* were remedies which the praetor gave to a person in special cases. For example, in case a man under twenty-five years of age entered into a transaction with another which turned out to be disadvantageous to him, he might get this order to have the bargain rescinded even though he could not prove that the other party was guilty of some fraudulent act. In all these cases it was the praetor himself who decided whether in any particular case, it was to be granted or not. He did not act arbitrarily in issuing them, but they were given according to the circumstances of each case. The praetor specifically provided for them, as in the case of his other reliefs, by a clause in his edict. The person to whom this was granted had also another redress, *viz.*, the *actio rescissoria*.

#### IV. EXTRAORDINARY PROCEDURE

The formulary procedure was abolished in A.D. 296 by Diocletian, and the extraordinary

procedure was substituted in its place. In Dr. Sherman's words,

"With the decay of Republican manners, private persons became reluctant to accept the irksome task of court-referee (*judex*) in civil suits; and especially was this difficulty experienced in the Roman provinces. Furthermore, the formulary system of procedure, which dated to Republican times, was incompatible with the policy of Diocletian and Constantine to transform the government of the Empire into a highly centralized absolutism."

It was called "extraordinary" because, even during the period when the system of formulary procedure was in vogue, the praetor sometimes used to decide the case himself without sending it on to a *judex*. He adopted this summary procedure particularly in dealing with cases relating to *fideicomissa*, *interdicts*, and *restitutio in interrum*. This exceptional system became ultimately the only form of civil process. Under it there was no longer any distinction between the legal proceedings before the praetor and the *judex*, for the former heard the case throughout, the practice of referring it to the latter having been abolished. The word *judex* gradually came to mean not a private citizen, but a Roman magistrate.

The proceedings began when the plaintiff appeared before a magistrate and briefly stated his case. Usually the former filed a written plaint before the latter called the *libellus conventionis* and, contrary to

older procedure, the magistrate sent the plaint to the defendant through a bailiff, an officer of the court. Both the parties appeared on the day appointed, either personally or through advocates, when the magistrate heard the case and passed judgment. Under this system the term *litis contestatio* was used to denote the state in the legal proceedings, when the real hearing began, and the case having passed through the initial stages, the defendant was about to open the case. "In general, therefore, the procedure in this period is not far removed from that with which we are familiar in modern systems".

#### V. APPEALS

In the Republican period there were no appeals, properly so called, from civil suits, even against the judgment of a *judex*. Augustus, for the first time, organised a system of appeals. To begin with, at Rome, a person could appeal from the decisions of all the magistrates to the prefect of the city, and then from the latter to the praetorian perfect or the emperor. In Marcus Aurelius' time, appeals were allowed from the judgment of a *judex* to the magistrate who appointed him. Outside Rome, in Italy and the provinces, there was an appeal to the governors from the magistrates in the first instance, and from them to the praetorian prefect or to the emperor. In Justinian's time, therefore, the emperor was the highest judge, and occasionally heard the case himself,

but usually a board consisting of the higher officials was constituted which functioned as a court of final appeal.

#### VI. RESTRAINTS ON VEXATIOUS LITIGATION

In Gaius' time, a plaintiff was restricted from launching a false suit against a defendant in the following ways:

- (1) by *judicium calumniae*;
- (2) by a solemn oath;
- (3) by a *judicium contrarium*; and
- (4) by a stipulation.

(1) In *judicium calumniae*, the plaintiff whose case was dismissed as false might be subjected to another action to ascertain whether in fact his suit was merely vexatious. If it was, he was liable to pay the defendant ordinarily one-tenth of the value of the matter in dispute and one-third in certain exceptional cases.

(2) The defendant could either proceed in the manner indicated above, or simply make the plaintiff take an oath as to his *bona fides* in filing the suit.

(3) *Judicium contrarium* was available only in exceptional cases. Further, unlike *judicium calumniae*, the defendant was not required to prove *mala fides* on the plaintiff's part, and he was entitled to compensation, even though the plaintiff may have honestly believed that he had a good case.

(4) The defendant had, in certain cases, the option of requiring the plaintiff to stipulate that if he

lost the suit, he would pay to the former the amount which was the subject of dispute.

Similarly, the plaintiff had the following remedies against the defendant:

- (1) he could, in certain cases like theft, be condemned, if found guilty, of *infamia*;
- (2) in some cases, defence increased the amount of his liability;
- (3) in others, the defendant could be compelled to enter into a verbal stipulation that he would pay a penalty to the plaintiff, if he failed in his defence; and
- (4) the praetor might require the defendant to take an oath that he had a good defence.

In Justinian's time, the methods of restraining unjustifiable litigation were as follows :

- (1) if the plaintiff sued without just cause, he was compelled to compensate the defendant for any loss incurred by him and to pay the costs of the action, and a defendant, as a rule, incurred increased liability by setting up a frivolous defence, e.g., under the *lex Aquilia*:
- (2) each party as well as his advocate was required to take an oath as to the *bona fides* of the claim or defence as the case might be;
- (3) a defendant setting up a false case incurred the risk of *infamia* in certain cases, e.g., a tutor or an agent.



## APPENDIX A

### CORPORATIONS (*Universitas*)

Corporations were of two kinds, *viz.*, (1) *Universitas personarum* and (2) *Universitas bonorum*.

(1) *Universitas personarum* or a university of persons. It was a fictitious or juristic person, composed of a number of individuals but regarded in law as one entity. This group of persons was capable of acquiring rights and duties in respect of property, but the rights they acquired were not vested in them but in the corporation which was regarded as a separate body distinct from the members of which it was composed. No corporation could be formed without legal authority. Later, the Emperor's sanction was necessary for the creation and extinction of *universitas*. Examples of corporations are municipalities, college of priests, etc.

(2) *Universitas bonorum*. These were juristic bodies not composed of persons. They were, as Dr. Moyle says, "so much property or masses of rights and duties personified and regarded as capable of perpetuating the separate existence and fictitious unity indefinitely". The chief examples of *universitas bonorum* were the treasury or *fiscus*, temples, hospitals, etc. Under the Republic, the state as possessing property was called *aerarium*. Under the early Emperors, the treasury of the Senate was called *aerarium*, and that of the Emperor, *fiscus*. When the Emperors later assumed absolute powers, the distinction between the two terms vanished.

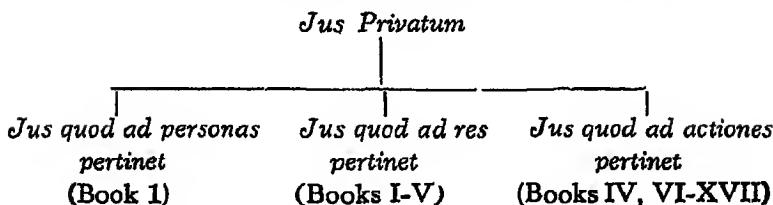
## DISABILITIES OF CORPORATIONS

Being fictitious persons, these bodies were subject to certain disabilities. As they were incapable of making declaration as to their intentions, they resembled lunatics and infants; so that they had to be represented by the agents designated in their constitution in all their transactions. Originally juristic persons could not take bequests or be instituted heirs. But Leo permitted municipalities to be instituted heirs in A.D. 469. Later Nerva and Hadrian declared them capable of taking bequests also. For the encouragement of gifts to pious foundations, like churches, the Christian Emperors declared that they were capable of receiving an inheritance or a legacy. But this privilege was not extended to all corporations.

## APPENDIX B

### ANALYSIS

*Institutes of Gavis and Justinian  
Preliminary Considerations Jus. Lex.  
Jus Gentium. Jus Naturale  
General arrangements of Justinian's Institutes*



Law of persons, treated under three heads.

I. *Libertas*. All men are either slaves or free.

Slavery. Nature and incidents of slavery.

Justinian's definition.

Modes of enslavement. A. *Jure gentium*.

B. *Jure civili*.

Modes of release from  
slavery

A. without master's  
consent,

B. with master's consent.  
(*manumissio*)

i. During republic.

ii. In the time of Gavis.

iii. In the time of Justinian.

Position of a freedman (*Libertinus, Libertus*)

II. *Civitas*. Grades of freedmen.

- i. *Dediticii* ; ii. *Peregrini* ; iii. *Latini veteres* ;
- iv. *Latini colonarii* ; v. *Latini Jurianni*.

Extension of *Civitas* under Caracalla.

Acquisition of citizenship by *Latini*.

*Iteratio, Anniculi Probatio, Erroris Causae Probation* etc.

vi. *Cives*. Patrician and Plebeian in Early Law.

Position of *Coloni*.

Rules for determining the *status* of Children.

III. *Familia*.

Conception of *Familia* in Roman Law.

From the point of view of *Familia*, *Cives* are either  
*Alieni Juris* or *Sui Juris*.

Persons *Alieni Juris*.

A. *Filiusfamilias*.

Nature and extent of *Patria Potestas*.

Modes of acquisition of *Patria Potestas*.

- i. Birth *ex Justis Nuptiis*. The Law of Marriage.  
*Concubinatus. Matrimonium Juris Gentium.*  
*Justae Nuptiae*.

Effect of a Roman Marriage. Dos.

*Donatio ante Nuptias*.

Essentials of a Roman Marriage.

1. Form ; 2. Age ; 3. Consent ; 4. *Connubium*.  
5. Divorce.

Manus in early law. *Usus. Confarreatio*.

*Coemptio*.

- ii. *Legitimatio* of issue of *Concubinatus*.

How carried out.

- iii. *Anniculi probatio*.

- iv. *Erroris Causae Probatio*.

- v. Adoption, 2 forms.

1. *Adoptio*, of a person *alieni Juris*.*Form.*

- a. Before Justinian.
- b. Under Justinian.

*Effect.*

- a. Before Justinian.
- b. Under Justinian.

Chief restraints on *Adoptio*.2. *Adrogatio*, of a person *sui Juris*.

Special characteristics.

*Form.*

- a. Early Law.
- b. Later Law.

*Effect.*

- a. Before Justinian.
- b. Under Justinian.

Special restraints on *Adrogatio*.Modes of release from *Patria Potestas*.

- |                                 |   |
|---------------------------------|---|
| i. <i>Adoptio</i> .             | } <i>Patria Potestas</i><br>ii. <i>Adrogatio of Paterfamilias</i> |
| iii. Passing under <i>manus</i> |   |
| iv. Death of either party.      |   |
- v. Misconduct of *Paterfamilias*.  
 vi. Accession to certain dignities.  
 vii. *Emancipatio*.

*Form.*

- a. Before Justinian.
- b. Under Justinian.

*Capitis deminutio*.Degrees of Cap. dem. Difficulty as to *Cap. dem. minima*.Effects of *Capitis deminutio*.B. Persons in *Mancipio*.Nature of civil bondage (*Mancipium*).

How created. How ended.

Duration in individual case.

**The Law of Persons.**

**III. Familia.**

**Persons *Sui Juris.***

Either of Complete civil capacity,  
or under *Tutela* or *Cura*.

*Tutela.* A. Of *Impubes.* B. Of Women.

**A. Tutela of *Impubes.***

Modes of appointment of *tutores.*

i. *Tutela Testamentaria perfecta—imperfecta.*

ii. *Tutela Legitima.*

1. *Agnates;*

2. *Patron;*

3. *Children of Patron;*

4. *Emancipating father.*

Peculiarity of this case.

(*Parens manumissor*)

iii. *Tutela Fiduciaria.*

1. *Manumissor Extraneus.*

2. *Children of Parens Manumissor.*

iv. *Tutela a Magistratu dativa.*

*Lex Atilia.* *Lex Julia Titia.*

Functions of *Tutor.*

i. *Administratio. Negotiorum Gestio.*

ii. *Auctoritatis Interpositio.*

*Contutores.*

Restrictions on appointment of *Tutor.*

Grounds of Exemption.

Security.

Remedies for misconduct of *Tutor.*

A. Removal of *Tutor.*

*Crimen Suspecti Tutoris.*

B. Damages for misconduct

*Actio Tutelae, etc.*

*Actio ex stipulatu,*

against sureties.

*Close of Tutela.*

B. *Tutela of Women.*

Modes of appointment of *Tutores*.

- i. *Testamentaria.*
- ii. *Legitima.*
- iii. *Fiduciara.*
- iv. *A magistratu dativa.*
- v. *Cessicia.*

*Change of Tutor.*

Functions of Tutor. *No Negotiorum Gestio.*

Restrictions, Exemptions, Security, Remedies, Termination.

*Cura.* Various forms.

A. *Cura of minors above puberty.* *Lex Plaetoria.*

Functions of *Curator*.

Restrictions, Exemptions, Security, Remedies,  
Termination.

B. *Cura Furiosi*

XII. Tables. Praetorian extension.

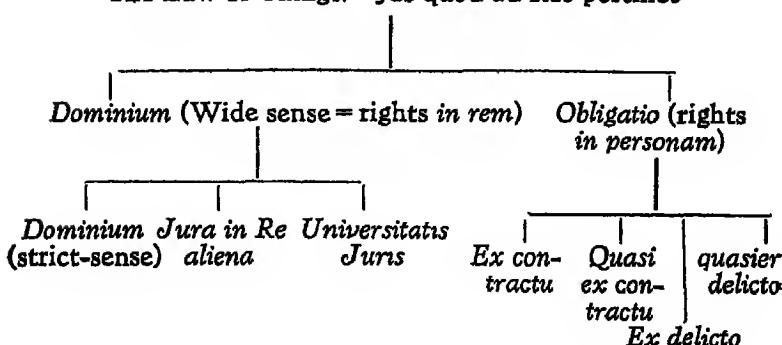
C. *Cura Prodigii*

XII. Tables. Praetorian extension.

D. *Cura ex aliis causis.*

*Cura Pupilli.*

The Law of Things. *Jus quod ad Res pertinet*



*Dominium Rei Singulae.*

Roman Conception of a <i>Res.</i>	Classification of <i>Res.</i>
<i>Res patrimonio nostro</i>	<i>R. Communes;</i>
<i>Res extra patrimonium</i>	<i>R. Publicae;</i> <i>R. Universitatis</i> (Incapable of ownership); <i>R. Sacrae;</i> <i>R. Religiosae;</i> <i>R. Sanctae;</i> <i>R. Nullius</i> (Unowned but capable of ownership).

Comparison of Classification of Gaius with that of Justinian.  
*Dominium.* Inferior modes of ownership. *Possessio in bonis*, etc.  
 Modes of acquisition of *Dominium Rei singulae*.

A. *Jure Naturali.*

- i. *Occupatio.*
- ii. *Accessio.*
- iii. *Specificatio.*
- iv. *Fructum Perceptio-separatio.*
- v. Treasure Trove.
- vi. *Traditio.*

B. *Jur Civilis.*

- i. *Cessio in Jure*;
- ii. *Mancipatio*;
- iii. *Usucapio* and *Praescriptio*.
  - 1. Usucaption at Civil Law;
  - 2. Praetorian *Praescriptio longi. temporis.*
  - 3. *Usucapio* and *Praescriptio* under Justinian.
  - 4. *Praescriptio longissimi temporis.*
- iv. *Adjudicatio.*
- v. *Jus accrescendi.*
- vi. *Lex.*
- vii. *Donatio*—(1) *Mortis Causa*; (2) *Inter vivos.*

Jura in Re Alienā.

A. Servitudes.

Classifications. Servitudes

Servitudes

a. Rustic.  
Praedial. } Urban.

b.  
Personal.  
Positive.  
Negative.

- i. Praedial Servitudes.
- Rustic Servitudes. Instances.
- Modes of acquisition.
- Urban Servitudes. Instances.
- Modes of acquisition.
- Modes of extinction of Praedial Servitudes
- ii. Personal Servitudes. Peculiarities.
  - 1. *Usufructus*. How acquired. How lost.  
Quasi-Usufruct.
  - 2. *Usus*.
  - 3. *Habitatio*.
  - 4. *Operae Servorum*.

B. Jura in Re Alienæ other than Servitudes.

- i. *Emphyteusis*.
- ii. *Superficies*.
- iii. *Pignus*. See later.

Power of Alienation in relation to ownership. *Dat qui habet*.

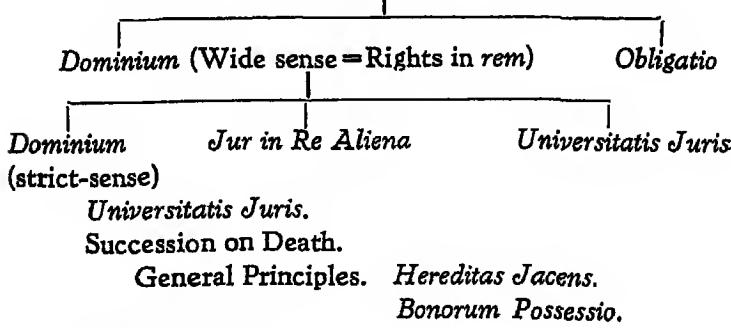
Exceptions. A. Owners who cannot alienate.

B. Non-owners who can alienate.

Acquisition through the Agency of others.

A. Of *Dominium*.      B. Of *Possessio*.

The Law of Things. *Jus quod ad Res pertinet*



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A. Form of Will.

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- ii. T. in *Procinctu*.
- iii. T. *per Aes et Libram*.
- iv. Praetorian Will.
- v. Tripartite Will.
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- i. To make a Will.
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C. Institution of Heir.

Form. Conditions. Institution of Slaves.

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- ii. *Fideicommissa* of *Res Singulae*.
- K. Codicill. History. Rules as to form and effect.
- L. Soldiers' Wills—Special privileges.  
*Dominium* (Wide sense—*Jura in Rem*)



- Dominium* (strict sense) *Jura in re aliena Universitatis Juris*
- II. *Universitatis Juris*. Succession on Death.
- Succession on Intestacy. General principles.
- A. Succession to *Ingenui*.
- i. Under XII. Tables.
    - Order. 1. *Sui heredes*.
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    - ii. Under Praetorian system. (*Bonorum Possessio*.)
      - 1. *Liberi*.
      - 2. *Legitimi*.
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      - Order. 1. Descendants.
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  - B. Succession to *Libertini*.
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- i. XII Tables.
  - ii. Praetorian Law.
  - iii. *Lex Papia Poppaea*.
  - iv. Under Justinian.
- Latini Juniani Dediticii*.
- Adsignatio Libertorum*.
- Discussion of Principles of Praetorian Succession.

(Bonorum Possessio).

Method of Procedure.

- i. *Bonorum Possessio Contra Tabulas.*
- ii. *Bonorum Possessio Secundum Tabulas.*
- iii. *Bonorum Possessio* on intestacy.
  - 1. *Unde Liberi.*
  - 2. *Unde Legitimi.*
  - 3. *Unde docem personae.*
  - 4. *Unde Cognati.*
  - 5. *Tum quam ex Familia.*
  - 6. *Unde liberi patroni patronaeque et parentes corum.*
  - 7. *Unde vir et uxor.*
  - 8. *Unde Cognati manumissoris.*

*Bonorum Possessio* also classifiable as.

- i. *Cum Re.*
- ii. *Sine Re.*

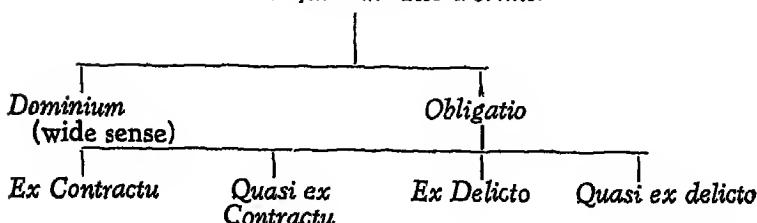
also as i. *Bonorum Possessio Edictalis.*

ii. *Bonorum Possessio Decretalis.*

Acquisition of the *Universitas* otherwise than on death.,,

- (a) *Conventio in Manum.*
- (b) *Adrogatio.*
- (c) *Successio miserabilis.*
- (d) *Bonorum Venditio. Bonorum Cessio.*
- (e) *Bonorum Sectio. Publicatio.*
- (f) *Addictio Bonorum Libertatis causa.*
- (g) *Hereditatis in Jure Cessio.*

*Jus quod ad Res Pertinet*



*General Conception of Obligatio*

Classifications of *obligationes* from different points of view.

*Obligatio ex Contractu.*

Classification of Contracts in the Institutes.

*Pacta Vestita. Pacta Unda.*

## The Law of Contract. Forms of Contract.

A. *Nexum. Per aes et libram. Peculiarities.*

Early obsolete.

B. *Contract Verbis.*i. *Stipulatio—General rule.*

1. *Form.*

2. *Parties.*

3. *Substance. Chief Restrictions.*

Cases where there are several parties on either side.

## 1. Where all principals. General rule.

Correality an exception.

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*Adstipulatores. Sponsors. Fide-promissores.*

*Adpromissores. Fidejussores.*

a. Rules applicable to *sponsores* only.

*Lex Publicia.*

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*Lex Apulia* (B.C. 102). *Lex Furia de Sponsu* (B.C. 95).  
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*Lex Cornelia* (B.C. 81) *S. C. Velleianum* (A.D. 46).

*Beneficium Divisionis B. Cedendarum.*

B. *Actionum*B. *Ordinis.*

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ii. *Dictio Dotis.*

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Development and decay of this contract.

*Nomina arcaria. Cautio. Chirographa Syngraphae.*

D. Contract Re. General Principle.

- i. *Mutuum*. Gratuitous loan for consumption and return of an equivalent.

*S. C. Macedonianum.*

- ii. *Commodatum*. Gratuitous loan for use.

Duties of the Parties.

- iii. *Depositum*. Deposit for custody.

Duties of the parties. Special cases.

- 1. *Depositum miserabile.*

- 2. *Depositum irregulare.*

- 3. *Sequestratio.*

- iv. *Pignus*. The contract of pledge.

Stages in development of this contract.

- 1. *Mancipatio cum contractu Fiduciae.*

- 2. *Pignus*. Power of Sale and Foreclosure  
*Pactum antichresis*

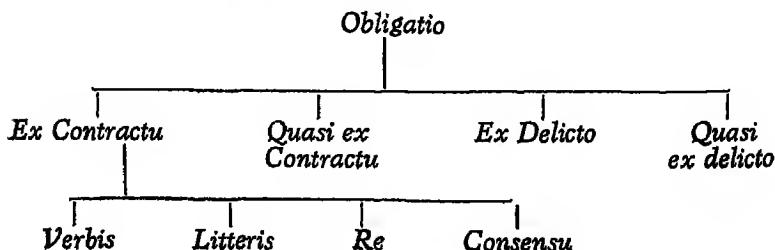
- 3. *Hypotheca.*

*Actio Serviana. Actio quasi serviana. Interdictum Salvianum.*

Cases of Implied Hypothec. Registration of Hypothecs.

(The Innominate Contracts. A late development. General Principle. Instances. *Permutatio, Precarium, Transactio*).

E. Contracts. *Consensu.*



**E. Contract Consensu.**

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Rules as to price.

Chief duties of the parties. *Actio quanto minoris. Actio Redhibitoria.*

Grounds of forced rescission.

*Pacta Composita.*

*Actio ex empto ex-venditio.*

ii. *Locatio Conductio.*

1. *Locatio Rei.* Rights and duties of the parties.

2. *Locatio operis faciendi.*

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iii. *Societas.* Partnership.

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1. *Societas unius rei.*

2. *Societas alicujus negotiationis.*

*Societas Vectigalis.*

3. *Societas universorum bonorum quae ex quaestu veniunt.*

4. *Societas universorum bonorum.*

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Rights and duties of the parties.

Close of partnership. *Actio pro socio.*

iv. *Mandatum.*

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*Mandatum* as a Contract of agency.

Peculiarities of *Mandatum.*

as compared with the other consensual contracts:

*Close of Mandatum.*

Development of Actionable Pacts.

*Pacta adjecta.*

- i. *Continua.*
- ii. *Ex Intervallo.*

*Pacta Vestita. Pacta Nuda. Pactum de Constituto.*

Subsidiary points in connection with the law of Contract.

*Agency. Incomplete development.*

*Interest. Unicarium fenus. Centesima Usura.*

*Mora i. Ex Re. ii. Ex Persona.*

*Naturalis Obligatio. How it arose.*

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*Obligatio Quasi Ex Contractu.*

Chief cases. i. *Negotiorum gestio.*

ii. *Tutores.*

iii. Community of goods.

iv. *Heres and Legatarius.*

v. *Solutio Indebiti.*

*Dolus and Culpa. Degrees of Culpa.*

Extinction of Obligations.

i. *Jure gentium.*

ii. *Jure civili.*

1. *Solutio.*

2. *Novatio.*

3. *Solutio imaginaria. Stipulatio Aquiliana.*

*Obligatio Ex Delitto*

<i>Furtum</i>	<i>Rapina</i>	<i>Damum</i>	<i>Injuria datum</i>	<i>Injuria</i>
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The Law of Delict.

A. *Furtum*

**Definition.** *Judicium Servi Corrupti :  
Actio Rerum Amotorum.*

General principles.

Actions which might arise from a *furtum*.

- i. *Ad rem persequendam. Vindicatio. Conductio Furtiva*

- ii. *Ad poenam persequendam.*

Distinction between *furtum manifestum* and  
*f. nec manifestum*.

Rules as to person entitled to sue on a *furtum*.

Various wrongs connected with *furtum*.

- B. *Rapina. Vi Bona Rapta.* General principles.  
Relation to *furtum*. Enactment of Theodosius (A.D. 430) on violent seizure even *bona fide*.

- C. *Damnum Injuria Datum.* Wrongful damage.  
Provisions of the *Lex Aquilia*. Difficulties in construction of some of its provisions.  
Extension of the provisions of this law by *Interpretatio* and Praetorian intervention, in various ways. *Actio Aquila duplex, contra, infinitantem*.

Alternative Remedies.

- D. *Injuria.* Outrage or insult.

Various meanings of the word *Injuria*.

Its special meaning here.

General principles. Various forms this delict might take.

Cases of *Injuria* to a slave.

*Atrox Injuria*.

When an *Injuria* was *atrox*.

Effects of *atrocitas* on liability.

*Obligatio Quasi Ex-Delicto*.

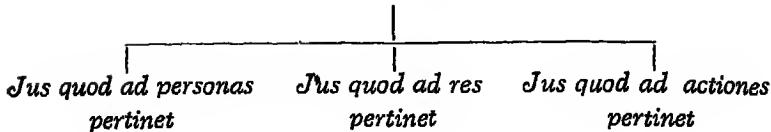
How distinguished from delict.

Chief Cases.

- i. *Judex qui litem suam facit.*

- ii. *Res dejectae aut effusae.*

- iii. Things suspended to danger of passers.
  - iv. *Nautae, caupones, etc.*
- Jus Privatum*



## THE LAW OF ACTIONS

General Principles. *Actio*

Historical Development of the Law of Procedure.

A. System of *Legis Actiones*.

General Characteristics of the system.

Individual *Legis Actiones*.

i. *Sacramentum*.

1. As an *actio in rem*. *Manus Consertio Praedes*.

2. As an *actio in personam*.

ii. *Judicis Arbitrue Postulatio*:

iii. *Condictio*.

*Lex Silia. Lex Calpurnia. (Condictio Triti- caria)*.

iv. *Manus Injectio*. General Character.

1. *Manus injectione judicati*.

2. *Manus injectio pro judicato. Lex Publilia. Lex Furia de sponsu*.

3. *Manus injectio pura. Lex Marcia. Lex Furia Testamentaria*.

v. *Pignoris Capio*.

Transition to Formulary System.

*Sponsiones. Interdicta. Recuperatory Procedure*.

Development of Formulary System and gradual decay of system of *Legis Actiones*.

*Lex Aebutia. Leges Iuliae*.

## B. Formulary System.

General course of trial of an action.

Characteristics of the *Formula*. Its parts.

- i. *Nominatio Judicis.*
- ii. *Praescriptio* } *pro re*  
                  } *pro actore*
- iii. *Demonstratio.*
- iv. *Intentio.*
- v. *Exceptio.*
- vi. *Condemnatio.*  
*Taxatio.*  
*Arbitrium.*  
*Adjudicatio.*

## Classification of Actions.

- i. *Actio in Rem.* (*Vindicatio. Actio Confessoria.*  
*A. Negatoria Hereditatis petitio.*)  
*Actio in Personam.*  
Form of the *intentio* in an *actio in rem*.  
*Actiones personales in rem. scriptae.*
- ii. *Actio Stricti Juris.* *Condicatio* in the Formulary System.  
*Actio Bonaefidei. Actio Arbitraria.*  
Importance of these distinctions.
- iii. *Actio in Jus. Actio in Factum.*
- iv. *Actio Civilis.*  
*Actio Praetoria. (Actio utilis)*
  - 1. *Actio fictitia.*
  - 2. *Actio in Factum.*
- v. *Judicium Legitimum. Judicium quod imperio continetur.*
- vi. *Actio Accessoria. (Actio Principalis).*  
*Actiones Noxales.* General principle.
- vii. *Actio ad Rem persequendam—ad poenam persequendam.*  
Peculiarity of *Actio Rapinae.*

- viii. *Actio in Simplem Concepta—in Duplem—Triplex—Quadruplex.*  
Peculiarity of *Actio Aquilia*.
  - ix. *Actiones quibus in Solidum Persequimur.*  
*Quibus non semper in solidum persequimur.*
  - x. *Actio Perpetua—Temporalis.*
  - xi. *Actio Quae and Heredem Transit—Quae non ad Heredem Transit.*
  - xii. *Actio Directa—Indirecta.*
  - xiii. *Actio Privata—Popularis.*
  - C. Later Procedure. System of *Cognatio Extraordinaria*. Development of the system. Enactment of Diocletian (A.D. 394). Characteristics. General course of an action.
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Incidental rules of procedure, etc.

- i. *Litis Contestatio*. Effect of *litis contestatio* on the rights of the parties.
- ii. *Plus Petilio. Minoris Petilio.*  
Varieties of *Plus Petilio*.  
Modifications of Later Law.
- iii. *Beneficium Competentiae*.  
Cases in which it was available.
- iv. Representation in Law suits.  
*Cognitor, Procurator, Procurator Voluntarius, etc.*
- v. *Compensatio. Deductio*. Set off.  
In actions by Banker, by *Bonorum Emptor*.  
Rules of Formulary System.
  - 1. *Bonae fidei Actiones*.
  - 2. *Stricti Juris Actiones*.
- vi. Rules under Justinian. *Actio Depositi*.
- vii. *Satisdatio*.

Rules of formulary system—

1. *Actiones in Rem.*
2. *Actiones in Personam.*

Rules of later law.

- vii. *Exceptiones.* General character. Origin.  
*Exceptiones peremptoriae* (or *perpetuae*)  
*Exceptiones dilatoriae* (or *temporales*)  
*Exceptiones personae cohaerentes—rei cohaerentes.*
- *Exceptiones in edicto propositae causa cognita data.*

*Replicationes etc.*

Process by way of Interdict. Nature of an interdict.  
General classifications of Interdicts.

- i. Possessory. Non-Possessory.
- ii. *Prohibitoria, Restitutoriae, Exhibitoria.*

Nature of the right called Possessio. Origin of possessory remedies.

Savigny's Theory of Possession. Ihering's theory.

Classification of Possessory Interdicts.

1. *Adipiscendae possessionis causa*
2. *Retinendae possessionis causa.*
3. *Recuperandae possessionis causa.*
4. *Mixtae.*

Discussion of various interdicts.

Procedure in possessory interdicts.

1. Single interdicts.
2. Double interdicts.

## APPENDIX C

### ROMAN HISTORY

#### *The Regal Period*

THE legends form the chief source of information for the early history of Rome. Though they are not of much historical value, historians have been able to construct out of them the broad outlines of early history. The period between 750 B.C., which is believed to be the year of the foundation of Rome and 510 B.C. when the last of the Tarquin kings was expelled from Rome is known in history as the period of the Seven Kings. During the reigns of the later Etruscan kings, Rome grew so rapidly that King Servius was forced to build extensive walls around Rome. By the time of the last of the kings Rome had become the capital of Latium.

During this early period the people of Rome were divided into thirty Curiae. "A Curia was a primitive association held together by participation in common festivals, common priests, hall and hearth". The popular assembly of Rome in its earliest days was that in which the freemen met and voted by their curiae (*Comitia Curiata*). By the side of this *comitia*, there was also the body of Senators who were taken from the leading 'gentes' and who held their seats for life.

The later Etruscan kings not only raised Rome to a prominent position in Latium but also introduced certain changes. To the Etruscan king Servius is attributed the division of the people into five classes according to wealth.

The unit was the *centuria* or company of a hundred men. The first class had alone ninety-eight centuries. Later on this military organisation became the basis for the organisation of the sovereign legislature of Rome. As each century had one vote, the richer classes had ninety-eight votes while all the other classes combined had only ninety-five.

It was during the rule of Tarquin the Proud, that monarchy was abolished in Rome. His rule was oppressive and the foul wrong done by his son to a Roman matron led to the rise of the people against the king and eventually to the abolition of monarchy and the establishment of the Republic in 510 B.C.

#### THE REPUBLIC

In the place of the king, two magistrates known as consuls were annually elected who commanded the armies and were the chief magistrates in Rome. Besides the consuls there were the senate and the popular assembly. The senate continued to be the council of the nobles of the city. The *Comitia Centuriata* was the supreme legislative assembly of Rome. It elected the consuls, acted as a court of appeal from the decisions of the consuls and made the laws of the State.

#### THE STRUGGLE BETWEEN THE ORDERS

"The struggle was in no sense a conflict between a conquering and a conquered people or between an exclusive citizen body and an unenfranchised mass outside its pale". Patricians and Plebeians who constituted the two orders of Rome were equally citizens of Rome. But the Patricians were the members of the *Gentes* which claimed the hereditary right of privileged position in the community. The Plebeian was a citizen with a vote in the assembly but he was excluded from any share in the higher honours of the State and intermarriage with the Patrician was not recognised as a legal union.

But though the Plebeians had political grievances it was social rather than political grievances that led to their first rising. The harsh law of debt which the poor resented led to their refusal to enlist themselves in the army. To deal with the situation the Senate created the Dictatorship—an absolute magistracy holding office for six months and from which there lay no appeal to the sovereign assembly. The poor Plebs left the city and threatened to form a separate State if their demands were not conceded. Then the Patricians yielded and accepted their right to have an organization and magistrates of their own. These magistrates were the Tribunes who had the power not only of checking and annulling the action of the ordinary magistrates but also of procuring an appeal to the people by interfering with the action of the magistrates. Besides these negative powers, they had the positive power of summoning the assembly of the people, arranged, not according to Centuries which gave a predominance to a wealthy few, but arranged according to tribes where votes were practically of equal value. But this assembly which was more like a party organisation could pass laws binding only on the Plebs.

The fusion of these two organisations into one State took place gradually when Rome was extending her power over Italy. The first move of the Plebs was to get the laws of the country written down so that there could be no loopholes left to the Patrician magistrates to interpret the customary law in the way in which they liked. The *Decemvirs* who were elected to draw up the laws published the Twelve Tables in 448 B.C. which provided punishments for attacks upon property. Some provisions favoured the Plebs also. The next great advance was made in 449 B.C. when by the Valerian laws it was settled that the decisions of the people assembled in their tribes should be binding on the whole people. It only remained for the Plebs to get their claims recognised for the offices. The right of the Plebs to hold the office of Military Tribune with consular powers was

recognised in 445 B.C. The economic grievances of the Plebs were redressed by the Licinian laws of 367 B.C. which limited the amount of public land which each citizen might hold. By the same legislation it was also established that one consul should always be a Plebeian. The powers of the consul had by now been divided among several officials. Praetors were appointed to act as judicial magistrates, Censors to make out the lists of citizens, and to fill up the ranks of the Senate, and Aediles to attend to the order and sanitation of Rome. Praetorship was thrown open to the Plebs in 337 B.C., the office of the Censors in 350, pro-consulship in 326 B.C. and the augurship in 302 B.C.

#### THE CONQUEST OF ITALY

The period occupied by the struggle between the orders at Rome witnessed the rapid development of Roman power over Italy. With the fall of Veii, the important Etruscan city, Rome established herself firmly in Central Italy. The expansion of Roman power, though checked for some time by the Gauls, went on gradually until Etruria and most of Latium were absorbed. Then began the war with the Samnites which went on for seventy-five years. All the peoples of Italy, the Etruscans and the Gauls rose in revolt against Rome. But the lack of concerted effort on the part of the enemies led to the ultimate success of Rome, which spread its power over the whole of Italy. Tarentum the Greek city in South Italy alone stood, but the defeat of Pyrrhus, king of Epirus, who had come to help the Greeks, extended Roman power still further south. Thus by stages Rome became the mistress of all Italy. Of the causes that led to Rome's rapid victories, mention must first be made of the strong discipline of her army, of the net-work of roads that she constructed so that her armies might move quickly and the colonies of Roman citizens that she established to protect the interests of Rome.

"The rule of Rome over Italy was not an absolute dominion over conquered subjects". It was in form at least a confederacy under Roman protection. The Italians were the allies and friends of the Roman people. They were attached to her as they were separated from each other. Internally they were allowed to manage their own affairs but in all questions of foreign relations the power remained with Rome. In times of war the allies were called upon to supply contingents of men who were to take their orders from the Roman consul.

The Roman state as distinct from that of her allies now covered an enlarged Roman State. This contained numerous communities with local institutions and government which could be modified by the Roman Senate. Over the administration of Justice in these areas Rome maintained her control by sending out prefects annually who administered justice.

The altered position of Rome brought with it certain changes in the military system. In the first place it weakened the old connection between the Roman army in the field and the Roman people at home, and thus prepared the way for the complete breach between the two which in the end proved fatal to the Republic.

#### ROME AND CARTHAGE

The completion of Rome's conquest in Italy brought her into conflict with Carthage which was a great commercial power in the Western Mediterranean. Sicily became the cause of war between the two rival powers. Neither could see with indifference the possession of Sicily by its rival because of its strategic position in the Mediterranean. The Carthaginians were in possession of the whole excepting a part of the east of the island which was held by the Greeks. When the Romans occupied Messina, their action led to a contest with Carthage. The first Punic war lasted from

244-241 B.C. As Carthage was a maritime power Rome was compelled to construct a fleet. It was sea-power that decided the issue of the war. Sicily became Rome's first oversea province. But the power of Carthage was not completely shattered and after a short period of peace between 241-218 B.C. when Rome extended her power over Cis-Alpine Gaul in the North and obtained possession of Sardinia and Corsica in the West, war again broke out. The Carthaginians had during this interval between the two wars entrenched themselves in Spain. It was from there that the Carthaginian army poured into North Italy, under the able leadership of Hannibal. The Carthaginians, though they proved to be far superior to the Romans on the battle field, could not bring about the fall of Rome. This was partly due to the fact that Rome possessed the control of the sea, and partly to the lack of support for Hannibal from Carthage. With the fall of the Carthaginian power, Rome turned her attention to the East. In the East, the Empire of Alexander had broken up and in its place had arisen three monarchic states, Macedonia, Syria and Egypt. There were besides the smaller states of Asia Minor and the Aetolian and the Achaean leagues of Greece. Rome conquered these states and held them without much difficulty. The chief cause that helped her success was the gulf that divided the rulers and the ruled in some of the states. The year 147 B.C. saw the formation of Macedonia into a province, the capture of Corinth and also the extinction of Carthage.

#### THE ASCENDANCY OF THE SENATE

At the close of the period of the great wars the Senate had risen to be the dominant power in the State. In theory the popular sovereignty remained unquestioned. But in practice the Senate wielded the greatest authority. This ascendancy of the Senate was not to any great extent the result of legislation. "It was the outcome of the practical.

necessities of the time ". The assemblies of Rome had become unwieldy in size and as their members were scattered all over Italy it was difficult to get them together. And even when they were summoned they found it difficult to decide intricate questions of military and foreign policy. The magistrates were many in number and the action of each magistrate could be checked by the opposition of his colleague. The Senate, on the other hand, was a permanent body and its members were experienced soldiers and administrators. "And it was within the walls of the Senate House that the foreign and domestic policy of the State were alike determined".

#### THE PROVINCIAL SYSTEM

During this period also the foundations of the provincial system were laid. In her relations with the conquered states outside Italy, Rome did not stick to the principles which she followed in Italy. These states were disarmed, taxed and brought under the rule of a resident Roman Governor. None of these states were allowed to contract alliance abroad. The Governor of a province was expected to follow the advice of the Senate on important matters. He held the Imperium but as he did not share the authority with any colleague and as there was no appeal from his sentences to any sovereign assembly he was more powerful than the consul at home. At first these Governors were magistrates who held the Imperium for one year, and were appointed with the consent of the people. Later on it became customary to appoint them simply by decree of the Senate without reference to the people.

#### THE PERIOD OF THE REVOLUTION

The Senate had thus governed the country with great success for 150 years. But the very expansion of the City-State into a big empire brought with it a number of evils,

The immense wealth of the provinces that flowed into Italy had the most demoralising effect on Roman society. The old simple life of the Roman was broken by the emergence of a rich capitalist class. The rich became greedy and the sturdy yeomanry class which formed the back-bone of the community was now being driven off the land and was flocking into the capital. The importation of cheap corn from Sicily made the production of corn in Italy unprofitable. The employment of slave labour by capitalists led free labourers to migrate into towns. "There are not two thousand property holders" said one of the Tribunes—"Two hundred families possessed millions and below were 300,000 beggars".

#### THE GRACCHI

To deal with this economic problem the Tribune, Tiberius Gracchus, began with the people. His one object was to bring the people back to the land. The Government owned lands which had been unjustly appropriated by the nobles. He proposed that the State lands should be resumed and distributed in small holdings among the poor. This proposal provoked a storm of opposition from the nobles. When Gracchus stood for re-election he was murdered in a riot. The popular party found another champion in his brother Gaius Gracchus. He brought back the agrarian law of his brother and added to it provisions by which colonies were to be established for poor citizens in South Italy, Corinth and Carthage. He wanted that the poor and half-starving populace of Rome should be supplied with corn for half-price. He dealt a severe blow to the authority of the Senate by taking away its privilege of keeping a control over judicial trials and giving it to the non-senatorial capitalists (Knights). Though at first he carried everything before him, yet within two years a rival politician drew away the popular favour from him. For the moment the Senate had

succeeded but the popular party had realized its own powers and before long had occasion to exercise them again.

### MARIUS

Ten years after the death of Gaius, the ascendancy of the Senate was once again challenged. And this time it was not on a question of domestic reform but over foreign administration that the conflict was renewed. The war against Jugurtha in Numidia showed the utter rottenness of the Senatorial Government. By a vote of the assembly, Marius, a man of humble origin was elected as the consul and entrusted with the expedition against Jugurtha. He succeeded and returned to Rome with Jugurtha as a captive. But once again Marius was called upon to save Rome from the attacks of the Cimbri and the Teutons. He defeated the enemies and returned to Rome triumphantly as consul for the fifth time. He then joined with the popular party and proposed reforms. But the recklessness and the violence of his allies alienated all classes in Rome. Marius had to protect the State against his own friends. These events completed the period of the greatness of Marius. His career marked a great and permanent change. "The transference of the political leadership to a consul who was nothing if not a soldier, was at once a confession of the insufficiency of the purely civil authority of the tribunate and a dangerous encouragement of military interference in political controversies". The military reforms of Marius made the army more democratic and brought about a greater loyalty to its leader.

### SULLA

The wars with Jugurtha and the Cimbri had brought Marius to the forefront. It was the revolt of the Italian allies against Rome that gave the opportunity to the Patrician Sulla. After

a year of fighting against the Italians the Roman franchise was given to such of the allies as were ready to surrender. The Italian war was hardly over when Rome had to face a great danger in the East. Mithridates, king of Pontus in Asia, took advantage of the Civil War in Italy to overrun the Roman provinces of Asia Minor and Greece. The question now arose as to who should be given the command of the army in the East against Mithridates. It was decided by the sword and Sulla took the supreme command of the army. He advanced into Asia Minor, Mithridates was compelled to accept peace and evacuate all the Roman lands. Before Sulla returned, his political opponents Cinna and Marius had occupied Rome, put down their enemies and crushed the power of the Senate. But Marius died in 86 B.C. and Cinna was killed when he attempted to take the army out of Italy with a view to wresting the command from Sulla. Sulla returned to Rome and by ruthlessly exterminating the opposition against him, made himself the absolute master of the Roman World.

His victory was followed by a series of massacres, proscriptions and confiscations, which left a legacy of hatred and discontent behind. "The re-establishment on a legal basis of the ascendancy which custom had so long accorded to the Senate was his main object". He wanted to prevent the usurpation of authority by the people and the overthrow of the constitution of Rome by the establishment of any such military dictatorship as was held by Marius. To secure this object, he was bent upon ruining the authority and powers of the tribunes who had been the chief instrument in the hands of the Senate's opponents. The wider powers of the tribunes were restricted and the tribune was declared to be ineligible to hold any other office in the State. The control of the courts was restored to the Senate. To prevent a soldier like Marius from rising to a dangerous position in the State he re-enacted the old law against re-election to consulship and made it legally binding for a man to mount up gradually to the

consulship through the lower offices. To the Senate he gave control over legislation, over the administration of justice and also complete control over the general policy of the State. The weakness in the Sullan constitution was that it was not possible to restore to the Senate its old dignity and honesty and prevent the rise of another Marius or Sulla. Sulla's constitution had been made by the sword and it could also be undone by the sword.

#### POMPEY

The Sullan Constitution worked for nine years and it was then overthrown by a successful general. It was again the series of revolts in the provinces that led to the rise of Pompey. In Spain the Marian party under Sertorius was active, in the East the armies of Mithridates were again overrunning the provinces of Asia Minor, in the Mediterranean the pirates destroyed commerce and harassed the shores of Italy and Italy was in the grips of a slave war.

To deal with the troubles in Spain, Pompey was sent to Spain, he returned victorious in 71 B.C. The slave revolt in Italy was put down by Crassus—the wealthiest man in Rome. They were both elected consuls in 70 B.C. and they restored the authority of the tribunate. The control of the courts was taken out of the hands of the Senate and the Censors purged the Senate of the worthless and disreputable members of the Sullan Party. Pompey's work clearly showed that the final decision in matters political lay with the holders of military power and not with either of the two parties in the State. From the time of Pompey onwards, the leadership in Rome fell from the hands of the tribunes into the hands of the leaders of the army.

When his Consulship was over, Pompey was given by the Gabinian law of 67 B.C. the supreme command in the Mediterranean for three years to put an end to danger from the

pirates. He was to have supreme authority over all Roman magistrates in the provinces throughout the Mediterranean. These powers were increased and the Manilian law transferred to Pompey the conduct of the war against Mithridates and with it the entire control of Roman policy and interests in the East.

This concentration of authority in one man was clearly unrepublican. But nothing could be done and Pompey sailed in 66 B.C. for the East. Mithridates was defeated and Pompey set the whole of the Roman Empire in the East in order.

But he did not return till 62 B.C. During his absence in the East, Caesar and Cicero had risen to great prominence. Being the nephew of Marius and the son-in-law of Cinna, Caesar sided with the popular party. As a member of the popular party, he had fought for the restoration of the Tribune and supported the Manilian laws. His one aim was to secure a command abroad similar to the one that Pompey enjoyed which would secure his position before Pompey's return. At this time it was Catilina's reckless conspiracy against the state that discredited all leaders of the popular party—including Caesar. And it gave the opportunity to Cicero, who was an orator and who by birth belonged to the Equestrian order. He wanted to re-unite both sections of the higher and propertied classes of Rome the landed aristocracy of the Senate and the moneyed aristocracy of the Equestrians against the forces of revolution and disorder. He failed because his ideal was impracticable.

Pompey returned from the East. He disbanded his army and demanded the ratification of his arrangements in the East and the assignment of lands for his veterans in Italy. The Senate refused some of his requests and hence Pompey went over to the popular party, which was then under Caesar and Crassus. This alliance between Pompey, Caesar and Crassus is known in history as the first Triumvirate. Caesar

was elected as consul and by the arrangements of the year 59 B.C. the Roman world was to be ruled by the three. Caesar was to have a command in Gaul for five years. Pompey was to remain in Rome and keep the Senate in order and Crassus was promised the command of a province. In 58 B.C. Caesar proceeded to Gaul with a large army. He succeeded in the very difficult task of subduing the nation. Caesar's work in Gaul saved the Western lands from foreign danger for another three centuries. These campaigns gave him the strength of a devoted army which was more loyal to him than to the Republic.

The trend of affairs in Rome led to the meeting of the three leaders at Luca in Italy. The Senate was growing powerful and it looked as if it would throw off the control of the three leaders. Cicero was the leader of this revolt. At Luca it was arranged that Pompey and Crassus should be elected Consuls and that Caesar's command in Gaul should be renewed for another five years. In the year 53 B.C. when Crassus went on his Eastern expedition against the Parthians he was killed. His death removed the powerful link that connected the other two leaders—Pompey was growing jealous of the position of Caesar whose victories in Gaul had added enormously to his reputation as a general. Pompey naturally drew closer to the Senate and it was as a champion of the Senate that he finally quarrelled with Caesar. Caesar had declared himself for the people. He marched on Rome with his army. Pompey was powerless and he embarked for Epirus where he hoped to raise an army for himself. Caesar did not follow him but proceeded to Spain where after stamping out resistance he returned to Italy. Then he left for Epirus where he crushed Pompey's forces at Pharsalia in Thessaly in 48 B.C. Pompey fled and was killed by an assassin in Egypt. A series of victories in Africa and in Spain made Caesar the sole master of the Roman world.

## CAESAR

"No proscriptions or confiscations followed his victories and all his acts evinced an unmistakable desire to effect a sober and reasonable settlement of the pressing question of the hour". Julius Caesar was the real founder of the Roman Empire. It was he who first definitely concentrated the Government of the Roman dominions in the hands of a single ruler and it was his prestige and the memory of his great achievements which allowed the subsequent system to establish itself so easily. It was he who directed the policy of Roman foreign affairs and the legates appointed by him led the legions and governed the provinces. The title of "Imperator" which he assumed expressed the absolute and unlimited nature of the power he exercised. The perpetual dictatorship that was granted to him in 45 B.C. was a contradiction in terms and a repudiation of constitutional government which excited the bitterest animosity. The Senate, the Assemblies, were all brought under the supreme authority of the dictator. The Senate was enlarged and old soldiers, sons of freedmen and even semi-barbarous Gauls were admitted to it. His changes were regarded with suspicion. In 44 B.C. a plot was hatched and he was murdered in March of the same year.

The murder of Caesar was followed by a war of succession. The most conspicuous of the claimants to the place which Caesar had filled were Antony, who was the sole consul, and Octavius, the grand-nephew of Caesar who had been mentioned as the heir in Caesar's will. These two along with Lepidus, another prominent Roman, formed the Second Triumvirate to punish the murderers of Caesar, Brutus and Cassius, who were defeated at the battle of Philippi in 42 B.C. Once again the Roman world was dominated by these three men. But soon the Triumvirate began to dissolve. Lepidus was set aside and the two men agreed to divide the empire

between themselves. The Eastern Roman Empire was taken by Antony and the Western Empire by Octavius. In the East Antony fell under the influence of Cleopatra and adopted oriental ways. Mutual suspicion drove them on to war and in the battle of Actium in 31 B.C. Antony was defeated. Octavius was master of the whole Roman world.

#### AUGUSTUS

Octavius now realised the necessity of a strong Government. He was conscious of the danger of restoring the undisguised autocracy of his grand-uncle. The only other alternative, of restoring the republican constitution of Rome, seemed equally impossible. "To the delicate task of reconciling personal rule with at least the forms of republicanism, Octavius now set himself and no man was ever better fitted for the task". He began with a series of reforms which were intended to show that he was desirous of restoring the Republic. The Senate was purged of its unworthy members. The temples and the shrines of the Gods were restored. He cancelled the irregular assignments made during the second Triumvirate. The Senate gave him the Imperium for ten years with the Government of certain specified provinces. He was made the commander-in-chief of all the forces and vested with the exclusive power of making war and peace. At home he was the chief magistrate with precedence over all other magistrates. He held for life the pro-consular and tribunician powers. By a decree of the Senate he was permitted to assume the title of "Augustus". According to the official version of things there had been a restoration of the Republic. But the powers now granted to Augustus were so wide that coupled with the personal ascendancy and prestige naturally attaching to the heir of Caesar and the conqueror of Antony they constituted him the real ruler of the Empire.

Augustus treated the Senate with great respect. Its membership was limited to men of Roman birth. Some provinces which required no military forces were under its administration and it was made the supreme tribunal of the Roman world. This system of Government has been sometimes described as "Dyarchy". This was true only in form. In reality the whole power lay with Augustus.

The old popular assemblies ceased to have any importance. The magistrates appointed by Augustus completely eclipsed the consuls and praetors. After the death of Augustus the whole system of popular election was discontinued.

Augustus had thus reformed the administration both in the provinces and at home. He had marked out the frontiers and had organised an imperial army for their defence. Peace was established throughout the Empire. But as his powers would expire with his death, he was anxious that he should settle the question of succession. He desired that his step-son Tiberius should succeed him and with this end in view he had invested him with the Imperium and the Tribunician power. In 13 A.D. he was made to administer the provinces along with Augustus and when the latter died in 14 A.D. Tiberius became the Emperor.

#### THE EMPIRE

Though Tiberius was an experienced administrator he remained throughout unpopular with the nobles and the commons. But the Empire fared well under his capable and vigorous rule. He maintained it intact and the legions were well under his control. He died in 37 A.D. and was succeeded by Caligula who loved all the ceremonies and pomp of absolute power. He was assassinated and was succeeded by his uncle Claudius. During his reign one important addition was made to the Empire. South Britain was also brought under Roman rule. His successor Nero showed no

sense of duty and indulged in excesses of vice and crime. Conspiracies were formed against him and in despair he fled from Rome and committed suicide.

Nero's death was followed by a period of violent revolution. There were risings in Spain, Gaul and Rome. At Rome the Praetorian guard declared in favour of Galba. As he was strict in the management of the State, he became unpopular. He was murdered and Otto became the Emperor. The revolt of the Praetorian guard in Rome spread to the provinces and the legions stationed there tried to enforce their own nominees as Emperors. The army of the Rhine declared in favour of Vitellius who in turn was overthrown by Vespasian, the nominee of the army in Syria. By his firm rule he was able to reduce the armies to obedience. His reign was followed by the reign of the two emperors Titus and Domitian when there was again a return to some of the worst features of the earlier period.

#### THE AGE OF THE ANTONINES : 96-180 A.D.

For about a century the Roman world enjoyed the benefits of a stable government. During this period the question of succession which gave rise to serious trouble in the earlier period was settled. The Emperor chose a prominent public servant, adopted him as his son and proclaimed him as his successor if he was satisfied with his conduct.

The Emperor Nerva (96-98 A.D.) although a man of good intentions had neither the strength nor the time to realise them. He adopted the Spanish Trajan, the best general of the Empire.

#### TRAJAN : 98-117 A.D.

He was one of the noblest and greatest of Emperors. He reduced the taxes, distributed among the cities of Italy

revenues intended for the support of poor children, and sold away the palaces which the early Emperors had got by confiscation. He added to the architectural decoration of the city of Rome by building temples, columns and arcades. He attended to every detail of provincial administration and gave an honourable place to the Senate. By his conquest of Dacia he not only added to the military prestige of Rome but also strengthened the Danubian frontier. In the East he marched the army against the Parthians, overran Mesopotamia and declared Armenia and Mesopotamia Roman provinces. He died in 117 A.D. while he was away in the Eastern campaign.

HADRIAN : 117-138 A.D.

Hadrian gave up the useless conquests of his predecessors in the East. In Britain he constructed the famous wall, from the mouth of the Tyne to the Solway Firth to prevent the inroads of the mountaineers. The only war during his reign was against the Jews. In internal affairs, Hadrian established for the first time a regular administrative system and a civil service. He carried further the philanthropic policy of Trajan—the authority of masters over slaves was limited. He had a big scheme of building. A number of cities were enriched by him with splendid monuments.

He was succeeded by Antoninus Pius in 138-161 A.D. His reign was peaceful and hence uneventful. His adopted son Marcus Aurelius Antoninus succeeded him and reigned for nineteen years. During his reign, the prosperity of the Roman world began to break up and he fought successfully the barbarians who attacked the Roman frontier in the North.

The death of Marcus Aurelius was followed by a period of violent changes, civil wars and barbarian invasions. Marcus was succeeded by his son Commodus who was vain, pleasure loving and despotic. He was assassinated in the year

192 A.D. Then there arose a competition among the various provincial armies to set up their own nominees as Emperors. The Pannonian legions gained for their general Septimius Severus 193 A.D. the imperial throne. He was a soldier and with him the empire assumed a nakedly military character which it was destined never to lose. He gave the soldiers higher pay and dangerous privileges. The soldiers were allowed to marry and live in towns to which they became more and more attached.

Severus was succeeded by his son Caracalla. The important event of the reign was the extension of the full rights of Roman citizenship to all the free inhabitants of the Roman Empire. After his death the Syrian soldiers imposed their nominee Elagabalus 218-222 A.D. as their Emperor who introduced into Rome some of his oriental ways. After his short reign of four years his cousin Alexander Severus 222-235 A.D. became Emperor. The ruin of the Parthian kingdom and the foundation of a second Persian empire led to a war on the Euphrates.

The death of Severus brought in another period of confusion in the Roman Empire when there was a break down of the Central Government. The various parts of the Empire practically established independent rule. This is borne out by the fact that the period is sometimes called the age of the thirty tyrants. As a result of the breakdown of the central Government, the barbarians beyond the frontier, began to break into the empire. The armies had become conscious of their strength, and they made and unmade emperors.

In 268 A.D. Claudius was made the Emperor by the army. He checked the advance of the Goths by defeating them in a battle. But his career was soon cut short by plague which carried him off, and he was followed by Aurelian who carried on the work of his predecessor. He succeeded in uniting the Empire, and keeping the Goths away, by defeating them, and

finally, by coming to an arrangement with them. His most famous achievement was his victory over Zenobia, the queen of Palmyra. When he was murdered in 274 A.D. there followed a period of ten years of confusion. In 284 A.D. the Danubian armies raised their general Diocletian to the Imperial throne.

#### DIOCLETIAN

By his victories, he was once again able to weld the Roman Empire. The Imperial authority was freed from all constitutional limitation. The Emperor was an autocrat in theory, as well as in practice. This despotism received additional prestige by the introduction of oriental ceremonies. "The final adoption of the title 'dominus' so often rejected by the earlier Emperors, the diadem on the head, the robes of silk and gold, the replacement of the Republican salutation of a fellow citizen by the adoring prostration before their lord, were all significant marks of the new régime."

Diocletian made further changes in the machinery of government. The Empire was to be ruled by two Emperors. They were to be helped by a coadjutor who was to have the title of Caesar and who succeeded the Augustus upon his death. The Empire was divided into twelve dioceses and these dioceses were divided into a hundred provinces. The number of officers was also increased. These administrative changes imposed additional burdens on the people. The army was divided into three divisions, one to defend the heart of the Empire, a second to defend distant frontiers, and a third to be moved whenever dangers threatened the Empire.

In his relations with the Christians, Diocletian proved to be a persecutor. By the edict of the year 303 A.D., he declared that all churches were to be destroyed and all Christian officers to be degraded. In 305 A.D. he laid down his power and retired into private life.

## CONSTANTINE

The arrangement by which the sovereign power was divided between two Caesars, broke down immediately after Diocletian's death. Constantine's father had been an Augustus and upon his death the army declared Constantine as Emperor. The assumption of the Imperial title by Constantine could not be maintained without resorting to force, for there were other rivals. In 312 A.D. he crossed the Alps and marched into Italy which was under the rule of Maximian. A great battle fought at Milvian Bridge near Rome made Constantine master of the Western Empire. Ten years later he defeated the Eastern Emperor Licinius also in a series of battles which made him supreme over the whole of the Roman Empire.

Constantine's reign of fourteen years was marked by two events, the recognition of Christianity as the religion of the Empire and the transfer of the capital of the Empire to Byzantium. The establishment of the new capital deprived Rome of its old prestige and also paved the way for the final separation of the East from the Western half of the Empire. Constantine died in 337 A.D. and there were plots and assassinations. It was only in 350 A.D. that Constantinus, the son of Constantine, became the sole ruler. In 355 A.D. Julian, his cousin, was associated with him in the task of Government. He defended the Rhine frontiers against the barbarian attacks. When the army was ordered to march to the East, it mutinied and saluted Julian as the Emperor. He accepted the title and marched against Constantinople. But before he marched to the place Constantinus had died. Julian became the Emperor. In his short reign he granted religious toleration to all. He also tried to put into practice the pagan ideas that he had imbibed while he was at Athens. His reign came to an end when he was killed while leading his army against the Persians.

In 364 A.D. Valentinian was acknowledged as Emperor. He conferred the title of Augustus on his brother Valens who

became the Emperor in the East. Valentinian kept the Danubian frontier safe against the attacks of the Barbarians but his death led to a serious crisis. The Goths obtained entry into the Empire. Soon hostilities broke out between them and the Romans. In the battle of Hadrianople that followed in 378 A.D. Valens was defeated and killed. The Goths marched very near to Constantinople and it was the tactful and conciliatory policy of the Emperor Theodosius that restored peace in the East. Upon his death in 395 A.D. his two sons Arcadius and Honorius succeeded to the Empire. In the same year the Goths elected Alaric as their leader and he marched into Italy in 401 A.D. The Gothic army was kept back by Stilicho who was the Roman General. It was the murder of Stilicho that made it easy for Alaric to march into Rome. After a feeble resistance by the Roman army, Rome fell into the hands of the Gothic chief. Alaric died in 410 A.D. and his successor Ataulf led the Goths into Gaul. It was about the same time that the Vandals crossed the Rhine frontier and settled in Spain. Honorius died in 423 A.D. His authority was little more than nominal over the greater part of his western Empire. The long reign of his successor Valentinian III (423-452) A.D. marked the further disintegration of the Empire. The Vandals captured North Africa and the Huns who attacked the Western Empire under Attila were repulsed. The murder of Valentinian ended the western branch of the house of Theodosius and the next twenty years saw the accession and deposition of nine Emperors.

But the real power during these years rested not with the Emperor but with the soldiers of barbarian origin who led the army. In 476 A.D. the soldiers rose in mutiny under a chieftain called Odoacer. The last of the Emperors, Romulus Augustulus, was deposed. Odoacer, who was now supreme, was content to rule with the title of Patrician. Thus the year 476 A.D. saw the disappearance of the Empire in the West. In the year 487 A.D. the Ostrogoths under their

leader Theodoric invaded Italy, overthrew Odoacer and established their rule over the whole of Italy.

While the Empire in the West had been replaced by barbarian kingdoms the Empire in the East had escaped invasion. In the year 527 A.D. Justinian became the Emperor at Constantinople and he kept intact the Eastern frontier and compelled the Persians to conclude a treaty in 562 A.D. He sent his famous general Belisarius to the West and he brought Africa and Italy once again under Imperial rule. More than his re-conquests of the Western Roman Empire, it was Justinian's codification of the law that earned him a great name in history.

After this brilliant period, the empire in the East passed many gloomy years. For centuries she braved victoriously the Muslims in the South. In the year 1453 A.D. the Turks stormed the city. The Emperor was killed in the battle and the Turks called the Muslims to offer prayers in the cathedral of St. Sophia.

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## ERRATA

p. 36 *for Sulpicious read Sulpicius.*

p. 44 *for Antonius read Antoninus.*

p. 110 *for plebians read plebeians.*

p. 115 *for Julia Adulteris read Julia de Adulteris.*

pp. 109, 113 and elsewhere

*for cum manum read cum manu.*

- *for sine manum read sine manu.*

p. 142 *for in manum read in manu.*

p. 193 *for Constantive read Constantine.*

p. 202 *for Litteris read Literis.*

p. 219 *for Publitia read Publilia.*

p. 269 *for comitis read comitiis.*



